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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CHICAGO BRIDGE & IRON COMPANY,
Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
SUPREME COURT
OF WASHINGTON

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is Washington required by the Commerce Clause to apportion in imposing its gross receipts tax on the proceeds of an interstate contract where: (a) only installation occurs in Washington, all selling and manufacturing activity occurring in other states; and (b) Washington law imposes this tax on both sales and manufacturing measured by the gross proceeds of the sale, but exempts manufacturing where both are in-state so that if the state of manufacture had Washington's tax system the gross receipts of the

interstate transaction would be taxed twice, compared to only once if the sales and manufacturing were both in Washington?

2. Where two contracts are entered into outside of Washington between companies based in other states, one for manufacturing outside of Washington and the other with a separate corporation for installation of the product in Washington, does Washington have nexus under the Due Process and Commerce Clauses to impose tax on the gross receipts from the manufacturing contract?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to this proceeding.

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JURISDICTIONAL STATEMENT

I. OPINIONS OF COURTS BELOW

The Memorandum Opinion entered on March 18, 1981, and the Findings of Fact and the Conclusions of Law and the Judgment entered on September 9, 1981 of

Judge Frank E. Baker of the Superior Court of the State of Washington for Thurston County were unreported, but are attached in the Appendix. The Washington Supreme Court opinion is reported in Chicago Bridge & Iron Co. v. Department of Revenue, 98 Wn.2d 814, 659 P.2d 463 (1983).

II. GROUNDS FOR JURISDICTION

The Washington State Supreme Court entered judgment on February 17, 1983. Appellant seeks review of that judgment pursuant to 28 U.S.C. § 1257(2). Appellant filed Notice of Appeal with the Washington Supreme Court on May 11, 1983, pursuant to U.S. Supreme Court Rule 10. This appeal is timely filed under U.S. Supreme Court Rule 11 and 28 U.S.C. § 2101(c).

III. CONSTITUTIONAL PROVISIONS AND STATUTES

Pertinent constitutional provisions and statutes are set forth verbatim in the Appendices.

IV. STATEMENT OF THE CASE

This case involves a suit for refund of Washington gross receipts tax, known as Business and Occupation (B&O) tax, which were paid on 100% of petitioner's gross proceeds from sixteen contracts. The Supreme Court of the State of Washington upheld the tax against contentions of petitioner that, as applied without apportioning the gross proceeds from the contracts, the tax discriminated against interstate commerce in violation of the commerce clause (U.S. Const. Art. I, § 8, cl. 3) and the due process clause (U.S. Const. amend. XIV), and that as to three of the contracts,

there was no nexus to impose any tax at all, thus violating the commerce and due process clauses.

All of the facts were stipulated.

All sixteen contracts required design, engineering and manufacturing work, all of which was performed outside the state of Washington. Stip. §§ 24, 68, 88, 120. For all these contracts, the customers' purchasing offices were outside the state of Washington, and all contract procurement activities between appellant and its customers took place outside the state of Washington. Stip. ¶¶ 6 and 50. Appellant had a Washington sales office in Seattle but that office "was not involved in any aspect of any of the contracts included in this action". Stip. § 18. Refund was not sought with respect to B&O taxes paid on contracts for which the Washington sales office was

directly or indirectly involved in the procurement or negotiation or upon contracts which were in essence contracts for the repair of products located in Washington state. Stip. § 5.

Under thirteen of the contracts, the product was installed in the state of Washington. Under the three contracts with Kamyr Incorporated, the contracts were completed by delivery into the state. Following delivery, the products were installed by appellant in the state of Washington under separate contracts with a sister corporation of the purchaser. Appellant does not contest the B&O taxes it paid on the proceeds of those installation contracts.

Under all of the contracts where installation was done in the state of Washington, the installation supervision and administration were performed by

appellant's Salt Lake City, Utah, or Fremont, California, construction offices. Stip. § 28. Installation equipment would be shipped from any of appellant's four Western District warehouses, including one which appellant had in Tacoma, Washington, to an installation site in any of the thirteen states in the Western District. Stip. ¶¶ 28 and 31. These warehouses were facilities for storage and routine maintenance of construction equipment used for installation. Stip. § 29. The warehouse in Tacoma handled 5% to 10% of the equipment storage and maintenance for installations by appellant in the Far East, Southeast Asia, Australia, and the thirteen states in the western part of the United States. Stip. §§ 28 and 30. The main construction warehouse was

located in Fremont, California. Stip. § 31.

For installations in the state of Washington, the project manager and the constructon supervisors were in the Fremont, California, contruction office and they visited the installation sites as their responsibilities required. Stip. §§ 92, 93. Appellant employed a group of trained installation supervisors who were temporarily assigned to installation sites throughout the United States for the duration of the product installation. For installation sites in the state of Washington, these supervisors reported to appellant's Salt Lake City or Fremont construction offices. The field foremen, pushers, welding supervisors and field engineers traveled throughout the United States to various installation sites as assigned

and remained on the sites as required throughout the installation process. They were not permanently assigned to appellant's activities in the state of Washington. Stip. § 97. Because of appellant's union contracts, appellant was required to make up the field crews with union members hired by the foremen through the local hiring halls in the state where the installation work was done. Stip. § 98.

Appellant is an Illinois corporation with its principal administrative offices and corporate headquarters in Oak Brook, Illinois. Stip. § 7. Appellant's business was worldwide and it engaged in business activities throughout the United States and other countries. Stip. §§ 8-28. The design and engineering work, procurement of materials and manufacturing work for the contracts here

involved were performed in Alabama, Arkansas, Delaware, Illinois, Pennsylvania, Utah and California. Stip. § 162. Appellant paid taxes to each of these states, as measured by its net income, including the income from the contracts involved in this action. Stip. § 162. Each of these states used its respective three-factor statutory apportionment formula to determine the portion of appellant's corporate net income subject to its tax. Stip. §§ 162, 163 and 164. Payroll incurred in the performance of these contracts was included in the foregoing states' respective payroll formula numerator. Some of the net income taxes paid by appellant to the aforesaid states are attributable to each of the contracts here involved. Stip. § 168.

The three Kamyr contracts were negotiated and executed between appellant and Kamyr Incorporated, through their respective offices in New York. Stip. ¶ 17, 18, 50, 170, Item 7 of Stip. Attachs. 1, 2 and 3. These contracts were for the design and engineering, procurement of materials and shop fabrication of a continuous digester, a soda-oxygen digester, and a blow tank. Kamyr Incorporated purchased the three items for resale to the Weyerhaeuser Paper Company in Washington. Stip. ¶ 170. From the same negotiations which resulted in the Kamyr contracts, three corresponding contracts were executed between appellant and Kamyr Incorporated's sister corporation, Kamyr Installations, Inc., through their respective offices in New York for the installation of these products. Kamyr

Incorporated, and Kamyr Installations, Inc., are separate corporate entities. Appellant challenges the B&O tax imposed by Washington on the gross proceeds of the manufacturing contracts with Kamyr Incorporated, not the taxes on the proceeds from its installation contracts with Kamyr Installations, Inc. Stip. § 172.

Facts are set forth in the Stipulation to establish three alternative methods of apportionment for the value added by the installation activities in the contracts which included installation. Generally 30% to 40% of appellant's costs incurred in performing those thirteen contracts herein involving installation could be attributable to appellant's activities within Washington State.

Appellant commenced this action in the Superior Court for the State of Washington, Thurston County, by Notice of Appeal dated August 16, 1976. An Amended Notice of Appeal was dated November 6, 1979. Trial was held on the stipulated facts. In the Notices of Appeal, as well as Appellant's Trial Brief dated November 20, 1980, Reply Brief dated December 20, 1980, Appeal Brief dated February 22, 1982 submitted to the Washington Supreme Court, Reply Brief dated May 21, 1982, and in oral argument at each proceeding below, appellant asserted all the constitutional arguments presented herein.

Those lower courts upheld the imposition of the B&O tax on 100% of the gross proceeds from the contracts involving installation and on 100% of the gross proceeds of the Kamyr contracts

which involved only design, engineering and manufacturing outside of the state and delivery into Washington.

V. ARGUMENT

A. The Washington Supreme Court Erred in Upholding the Tax on All Unapportioned Gross Receipts Where the Only In-State Activity Was Installation.

The decision below upholds Washington's business and occupation tax on 100% of the gross receipts, without apportionment, from contracts where the only activity in the State of Washington was installation. All other activity, including selling, design, engineering and manufacturing, occurred in other states. If the Washington tax system were in effect in the state of manufacture, that state would also impose a tax on the gross receipts from the contract, thus resulting in two taxes on the same receipts. A competitor, both manufacturing and installing in

Washington, would pay only one such tax. RCW 82.04.240; RCW 82.04.250; RCW 82.04.270; RCW 82.04.440. The Washington court holds that there is no discrimination against interstate commerce, because the states of manufacture here had an income tax rather than a gross receipts tax, and thus there was no actual double gross receipts taxation. "Risk" of discriminatory taxation is not sufficient, the court held.

The court below also appears to hold that even if the state of manufacture had Washington's tax system, and actually imposed tax on gross receipts from these contracts so that appellant paid two such taxes on the same gross receipts compared to only one such tax by its Washington competitor, there still would be no requirement for apportionment by

Washington. Chicago Bridge & Iron Company, supra, 98 Wn.2d at 831-832, 659 P.2d at 473.

Each of these bases for the decision below is contrary to the principles stated by this Court in Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980). There, this Court found that the income which was being taxed "bears relation to benefits and privileges conferred by several States. These are the circumstances in which apportionment is ordinarily the accepted method". 445 U.S. at 446. Also, this Court stated: "We agree with Mobil that the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy". 445 U.S. at 444. These same principles were confirmed in Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980).

B. Washington's B&O Tax Is Not Apportioned.

This Court has previously stated with respect to Washington's B&O tax:

> "It is unapportioned and, as we have pointed out, is, therefore, suspect." General Motors Corp. v. Washington, 377 U.S. 436, 448 (1964).

Despite this, the court below takes the position that Washington's tax is apportioned because it does not tax the worldwide income of an out-of-state manufacturer. Such a principle could give license to every state involved in manufacturing or sales on an interstate transaction to adopt the same tax system as Washington, each taxing the full gross receipts, resulting in discriminatory multiple taxes on interstate transactions. The fact that the State of Washington has not taxed 100% of appellant's worldwide receipts from all

sources, does not constitute an apportionment. If we assume arguendo that these sixteen contracts generated all of appellant's worldwide receipts, then Washington would be taxing 100% of appellant's worldwide receipts, without apportionment, notwithstanding the substantial sales, design, engineering and manufacturing activities which occurred in other states. Apportionment of a gross receipts tax requires some reasonable method of relating the tax base on which the state imposes tax to the contribution that state makes to the particular gross receipts involved.

The Washington tax is not a single factor tax, such as that considered in Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), reh'g denied 439 U.S. 885 (1978). There, the Iowa tax system imposed tax on net income based on the

single factor of sales into the state. Consequently, a manufacturer in another state having the same tax system as Iowa, would pay no tax in the manufacturing state on sales into Iowa, and could sell into Iowa, paying tax only to that state, the same as his Iowa competitor. Washington, however, imposes its tax, measured by the gross receipts from the contract, on both sales and manufacturing. RCW 82.04.240, 82.04.250, 82.04.270. Washington law defines installation as a sale. RCW 82.04.050. Where both occur in the state, the tax on manufacturing is exempted, and the tax is imposed only on the sale. RCW 82.04.440.

The Washington Department of Revenue rules permit a Washington manufacturer which installs its product in another state to deduct from the contract price the additional value resulting from the

out-of-state installation. Washington Dept. of Revenue Excise Tax Rules 137 and 194 (WAC 458-20), Excise Tax Bulletin 399.04.137 (CCH Wash. §§ 200-670). The stipulation in the present proceeding contains facts on which a proper apportionment may be made as to each contract involved, and those facts indicate that the value added by the installation ran between 30% and 40% of the various contract prices. If the state in which the manufacturing here involved had Washington's tax system and had the same interpretation as given to the Washington tax, that state would have imposed tax on 60% to 70% of the total contract price, and Washington, under the decision below, would still tax 100% of the contract price.

The Washington Department of Revenue ruling allowing the Washington

manufacturer to deduct the additional value resulting from out-of-state installation appears to be an effort to protect the Washington manufacturer from double tax. It does not appear to contemplate that the installation state might tax the full proceeds of the contract. Yet, when things are reversed, and Washington is the installation state, no selling or other activity being performed in Washington, Washington refuses to recognize this principle of apportionment and holds that as the installation state it may tax the entire proceeds of the transaction.

C. Where Other States Have Nexus to Impose Tax on Same Receipts if They Had Washington's Law, Unconstitutionality Does Not Depend on Actual Double Tax.

For at least forty-five years, this Court has recognized that the multiple

taxation doctrine requires that multiple burdens must not be "capable" of being imposed on commerce, whether or not they actually were imposed. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255-256 (1938). Yet, the Washington State Supreme Court below rejected the discrimination argument of appellant without addressing the fact that the other states in which the manufacturing occurred had nexus to impose a direct tax on the gross receipts from the contracts under a tax system like that of Washington. Rather, that court avoided the issue by stating:

> ". . . Recent cases have indicated, however, that a "risk of multiple taxation is not sufficient grounds for declaring a tax unconstitutional". See Mobil Oil Corp. v. Commissioner of Taxes, supra, 445 U.S. 425 (1980); Exxon Corp. v. Department of Revenue, supra, 447 U.S. 207 (1980)." Chicago

Bridge & Iron Co. v. Dept. of Revenue, supra, 98 Wn.2d at 831, 659 P.2d at 473.

When applied to the facts of this case, Mobil and Exxon do not support this statement of the Washington court.

The tax here, as interpreted by the court below, allocates 100% of the proceeds from certain interstate commerce to the state whose tax imposition is before this Court. Thus, it is comparable to the situation which would have been involved in Mobil if the domiciliary state of New York's tax laws were before the Court and that state had actually allocated to itself 100% of the dividend income as the taxpayer there theorized. Similarly, this case presents the issues which would have been before this Court in Exxon if the situs state had been before the Court and that situs state had allocated 100% of the income

from exploration and production of crude oil and gas to that state as the taxpayer there theorized was possible.

We recognize that in Mobil, in addition to stating that the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy, this Court stated: "the absence of any existing duplicative tax does alter the nature of appellant's claim". Mobil, supra, 445 U.S. at 444 (1980). Cf. Exxon, supra, 447 U.S. at 228-229. In both cases, this Court refused to declare an apportioned tax to be violative of the Commerce Clause where there would be no risk of discriminatory multiple taxation burdens if the other states with requisite nexus were to adopt the apportionment laws in existence in the state whose tax laws were before the Court.

The risk test does not mean, and has not meant, the possible risk resulting from some theoretical tax system neither in existence in the state whose laws were before the Court nor in the states who also have nexus to tax. Rather, the test is the practical effect of whether the taxing state's actual tax system projected into the other states having nexus to tax the transaction would result in discriminatory burdens on interstate commerce not borne by the local competitors. See, Western Live Stock v. Bureau of Revenue, supra, 303 U.S. at 255-256; J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 439-440 (1939); Evco v. Jones, 409 U.S. 91, 93-94 (1972); Austin v. State of New Hampshire, 420 U.S. 656, 668 (1975); National Geographic Society v.

California Board of Equalization, 430 U.S. 551, 588 (1977); Mobil Oil Corp. v. Commissioner of Taxes, supra; and Exxon Corp. v. Wisconsin Department of Revenue, supra.

Where the state tax system contained a rational attempt at apportionment, this Court has stated that some risk of nominal overlapping in taxation may constitutionally be acceptable because of "mathematical imprecision" in the various nonuniform apportionment formulas used by the states. See, Moorman Mfg. Co. v. Bair, supra, 437 U.S. at 274, and Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 455 (1979). See also, Mobil Oil Corp. v. Commissioner of Taxes, supra, and Exxon Corp., supra. Nevertheless, this does not permit a state to allocate to itself 100% of the proceeds of an interstate transaction,

making no attempt whatsoever to reasonably apportion.

While the Mobil and Exxon decisions involved income taxes, rather than gross receipts taxes, the basic principle of apportionment there enunciated would apply to both kind of taxes. See Commonwealth Edison Co. v. Montana, 453 U.S. 609, 614-618 (1981). There is no justification for a constitutional rule which carves out a special privilege for the states having gross receipts taxes whereunder more than one state could impose unapportioned taxes on the same tax base while prohibiting the states having income taxes from imposing unapportioned taxes on net income from the same interstate operations.

D. In Practical Effect, Washington Gives In-State Manufacturers an Exemption Denied to Out-of-State Manufacturers.

This Court recently said:

> "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 443, 63 L.Ed 2d 510, 100 S. Ct. 1223 (1980)." Commonwealth Edison Co. v. Montana, 453 U.S. 609 at 615 (1981).

In substance, one who is subject to the retail or wholesale B&O tax being imposed here is being given an exemption by RCW 82.04.240 from B&O manufacturing taxes otherwise due on the taxpayer's Washington manufacturing of the products sold, but is given no exemption for taxes which may be imposed under an identical law on its manufacturing if the taxpayer manufactures out-of-state and then ships the goods into Washington in interstate

commerce. The "practical effect" is that any persons engaged in completely in-state and local commerce of exactly the same nature as appellant's business would not be exposed to the multiple tax burdens to which out-of-state manufacturers such as appellant could be subjected. See Commonwealth Edison Co. v. Montana, supra.

It is because of credits which had the comparable effect of benefiting local interests that this Court held that Louisiana's First-Use Tax discriminates against interstate commerce in violation of the Commerce Clause. Maryland v. Louisiana, 451 U.S. 725 (1981).

E. Both Gross Receipts and Net Income Tax States Need Resolution of Confusion as to Risk of Discriminatory Taxation.

Despite the comment in Mobil agreeing that the constitutionality of a state tax

should not depend on the varying laws of another state and despite the decisions of this Court reflecting that principle, there is an impression, as reflected in the decision below, that this Court would hold that a tax on 100% of the unapportioned gross receipts from an interstate transaction is constitutional if the other state involved does not impose the same type of tax on those receipts, even though this Court may hold that such tax on the unapportioned receipts would be unconstitutional if the other state imposed the same kind of tax on the same receipts. If this impression were correct, then the constitutionality of the Washington B&O tax would vary according to the varying laws of the other states involved in interstate transactions.

Several states, such as West Virginia, Delaware and Hawaii, have gross receipts tax systems similar to that of Washington. It is of substantial importance to the administration of the gross receipts tax laws of these states that this ambiguity be resolved.

Moreover, the issue presented here is important, not only for the states having gross receipts taxes, but also for the income tax states. The income tax states generally understand that apportionment is required as to income arising from any activities which would be subject to income tax in another state, even though that other state does not have an income tax. For example, § 25121 of the Revenue & Taxation Code of California (Uniform Division of Income for Tax Purposes Act--"UDITPA") states (CCH Calif. State Tax ¶ 228-405).

> "Any taxpayer having income from business activity which is taxable both within and without this state shall allocate and apportion its net income as provided in this Act". See also § 38001 of the Revenue and Taxation Code of California, Multistate Tax Compact Article IV 2.

Section 25122 of the same Code states (CCH Calif. State Tax ¶ 228-414):

> "For purposes of allocation and apportionment of income under this Act, a taxpayer is taxable in another state if . . . (b) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether in fact the state does or does not." See also § 38001, supra, Multistate Tax Compact Article IV 3(2).

If the Washington Supreme Court's view is correct that apportionment is not required if the other state involved does not actually impose a similar tax on the transaction, it would appear that income tax states like California would not need

to apportion where it had nexus to tax the income and the other state or states involved had no net income tax. For example, California in that case could tax the entire net income of a Washington manufacturer, all of whose products were shipped to and installed in California, because Washington has no net income tax. This is not the understanding on which present administration of the income tax laws of the various states is based. Proper administration of the state income tax laws is therefore also dependent on resolution of this question.

F. Absence of Selling Activity in the State Makes the Standard Pressed Steel and General Motors Decisions Inapplicable.

Prior to its decision in Mobil Oil Corp. v. Commissioner of Taxes, supra, this Court upheld the Washington tax on full gross receipts in Standard Pressed

Steel Co. v. Department of Revenue, 419 U.S. 560 (1975), and General Motors Corp. v. Washington, supra. The court below relied on those decisions. However, those decisions were based on in-state sales activities which related to, preceded, and in practical effect resulted in the procurement of the particular sales taxed. Standard Pressed Steel, supra, at 561. Washington was not only the destination state, but also was the state in which selling activities occurred. Moreover, unlike the instant case, the taxpayer in Standard Pressed Steel, supra, made no effort to show any "risk of multiple taxation". Id., 419 U.S. 563. It may be that these decisions are to be reexamined in light of Mobil, but they do not apply here in any event. There was no procurement activity in Washington in this case.

The strained attempt of the court below to find in-state sales activity in an apparent effort to bring this case within these decisions is inconsistent with, and unsupported by, the stipulated facts. For example, while the court below admitted only that CBI's Seattle sales office was not "directly involved" in the procurement of these sixteen contracts (98 Wn.2d at 818, 659 P.2d at 466), and went on to state that CBI's Seattle sales office "was involved in the passive sense of being present, aware of the transaction and available to assist if necessary" (98 Wn.2d at 828, 659 P.2d at 471), the stipulated fact was that the Seattle Sales office "was not involved in any aspect of any of" these sixteen contracts. Stip. ¶ 18. It was also stipulated that the sixteen contracts were in every case negotiated, procured

and finalized between CBI's sales offices outside of the State of Washington and the customer's purchasing offices outside the State of Washington. Stip. ¶¶ 13, 14, 15, 17, and 50; Stip. Attachments 1-16, Item 7.

There is also no support in the record for the court's conclusion that installation personnel had something to do with the establishment of the sales here involved. Appellant's Tacoma warehouse operated only to store materials for installation activities in the thirteen western states. It has no relationship whatever to procurement of these contracts.

Appellant agrees that the installation in Washington is sufficient to give the state nexus to impose tax on an apportioned basis, except for the three contracts with Kamyr Incorporated,

later discussed. However, the record directly contradicts the effort of the court below to imply that any personnel or activity of appellant in Washington in any way affected the procurement of these contracts.[1/]

G. The Three Kamyr Contracts Have No Nexus with the State of Washington.

The issue of sufficient nexus only relates to the three contracts with Kamyr Incorporated with respect to which all appellant's activities took place outside the State of Washington. Stip. ¶ 172.

The mere fact that Washington is the state of destination does not provide the requisite nexus for this state to impose

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1/ It also serves to discourage attorneys from relying upon fully stipulated records notwithstanding the fact that their greater use would aid in minimizing judicial backlog.

a direct tax on appellant's proceeds from these contracts. See Norton Co. v. Illinois Department of Revenue, 340 U.S. 534 (1951); American Oil Co. v. Neill, 380 U.S. 451, 457-459 (1965); WAC 458-20-193 Part B (Revenue Rule 193 Part B). The nexus requirement for a direct tax, such as a gross receipts tax, involves more than a relationship between the taxpayer and the taxing state; there must also be a relationship between the activity sought to be taxed and the taxing state. While the former relationship is sufficient nexus for use tax purposes, it is not for direct taxes. See National Geographic Society v. California Board of Equalization, supra, 560-561.

The court below took the position first, that the existence of the Washington office and warehouse enabled

the state to tax these contracts. Yet those facilities had nothing to do with these contracts which were negotiated in New York for design and manufacturing entirely outside of Washington. If the Washington court's view were correct, any out-of-state firm having an office in Washington would be taxable on all products shipped to the state, even though the local office and personnel had nothing whatsoever to do with the product and there was no activity carried on in Washington involving the contract.

As a second position, the court below holds that it may treat the manufacturing contract and the installation contract as one contract for its tax purposes, even though appellant entered into the contracts with two separate corporations. Neither the State nor the court below challenged the arm's length

amount of the installation prices agreed to in the installation contracts. Stip. ¶¶ 47, 170. Since in most sales of large equipment which requires installation, the customer desires to know in advance what the total costs will be, the overall price was determined in advance. The fact that such an overall cost is arrived at is no basis for challenging the arm's length nature of the prices fixed.

At least where there is no challenge to the arm's length nature of the prices, where separate contracts with separate corporations are executed one for design and manufacturing in other states and the other for installation in Washington, Washington has no nexus to impose B&O tax on the manufacturing contract. Imposition of the tax on the proceeds of those contracts here violated the due process and commerce clauses of the constitution.

VI. CONCLUSION

For all the foregoing reasons, we respectfully submit the questions here presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, and request that the Court accept jurisdiction and ultimately rule for the appellant in this case.

DATED: May 12, 1983.

LeSOURD & PATTEN

By F. A. LeSourd
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By Rodney J. Waldbaum
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APPENDIX 1

OPINION OF WASHINGTON
STATE SUPREME COURT

FILED IN CLERKS OFFICE, SUPREME COURT, STATE OF WASHINGTON, FEBRUARY 17, 1983.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHICAGO BRIDGE & IRON COMPANY, an Illinois corporation, Appellant,	NO. 48133-4
v.	
THE STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	

BRACHTENBACH, J.--Appellant Chicago Bridge & Iron Company (CBI) seeks a refund of a portion of business and occupation (B & O) taxes paid on the gross receipts of sales of goods designed, manufactured, and installed for customers in Washington, but contracted

for outside the state. CBI contends the tax is unconstitutional as a violation of due process (U.S. Const. amend. 14, § 1 and Const. art. 1, § 3) and the commerce clause (U.S. Const. art. 1, § 8, cl. 3). The trial court found the tax constitutional and denied CBI's refund request. We accepted direct review and affirm.

CBI is an Illinois corporation licensed to do business as a foreign corporation in Washington. The corporation designs, engineers, manufactures and installs large, welded steel-plate structures, such as storage tanks, silos, nuclear containment vessels, and hydroelectric generator components.

At issue here are 16 of a total of 149 contracts for CBI products, designed, manufacturered, and installed for

Washington customers during the audit period of 1967-75. For all 149 contracts the products were manufactured outside the state of Washington, but they were designed for use by a Washington customer and were delivered and permanently installed in this state. CBI voluntarily paid taxes on 133 contracts not at issue in this action.

The principal distinction between the 16 contracts included in this action and the other 133 contracts is that neither the negotiation for, nor the formalization of, the contracts in this action took place within the State of Washington or involved CBI's Seattle sales office. Because the negotiation and formalization of these contracts occurred out of state, CBI argues there was no "sales" activity within the state,

and therefore a B & O tax measured by the gross proceeds of sales is improper.

For 13 of the 16 contested contracts, CBI installed or assembled its product in Washington and does not contest the assessment of B & O taxes on the portion of their revenue attributed to these in-state activities.[1/] It does contest, however, the B & O tax assessed on the total revenue from the sales.

For three of the contracts, CBI bifurcated its contract to design, manufacture and deliver the product from the contract to assemble and install the product. At the request of the purchaser, CBI entered into six separate written contracts concerning three products: three with Kamyr, Inc., for the

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1/ CBI estimates its installment activities constitute 30 to 40 percent of the total contract price.

design and fabrication of the product, and three with Kamyr, Inc.'s sister corporation, Kamyr Installations, Inc., for installation of the three products at Everett, Washington. As with all other contracts, a lump sum contract price represented the total of CBI's involvement, from design through installation, for these three products. Concerning the three contracts for design and fabrication, CBI maintains Washington has no jurisdiction to impose its B & O tax upon the three corresponding installation contracts and those contracts are not included in this action. The three Kamyr contracts will be given special attention in the analysis below.

First, however, some explanation of CBI's business operations may prove helpful. CBI generally performs all

aspects of design, manufacture, delivery and installation of its product, and customers negotiate a single, lump-sum price for a finished, installed product. CBI's engineering, manufacturing, and installation operations are functionally integrated and coordinated from the first proposal to a customer through each phase of the design, manufacturing and installation process. This integration is accomplished through frequent communications among the divisions and departments of the company. Although CBI's products may be similar in function and appearance, each is custom made to the specifications of the customer. Each product here was designed and manufactured for permanent installation and use in Washington.

CBI maintains a sales office in Seattle, which is responsible for

customers whose purchasing offices are located in Alaska, Washington, Oregon, Idaho and Montana. The Seattle sales office was not directly involved in the procurement of these 16 contracts, because the principal offices of the corporate purchasers were not in its district. Nonetheless, the Seattle office was informed, as a matter of courtesy and pursuant to CBI's general practices, of contracts which involved work within its territory. This information was usually received through informational copies of the contract or correspondence.

CBI has permanent employees, project managers, who supervise and coordinate the installation and cost controls associated with the contracts. These individuals generally perform a site survey at the installation site in

Washington when the contract is first obtained, and visit the site during the installation process.

Installation requires extensive site preparation and on-site assembly of parts. Permanent CBI foremen supervise the installation process. The persons who do the actual moving of equipment and materials and the welding necessary to the installation of the products are hired by CBI from local Washington union hiring halls. Other permanent CBI employees visit the Washington installation sites to ensure customer specifications and CBI standards are being achieved.

The total number of CBI employees in Washington during the audit period ranged from 11 to 309.

Beginning in 1969 and throughout the audit period, CBI also maintained a

warehouse in Tacoma, Washington for the central storage and maintenance of equipment used in the installation of its products. The warehouse had a maximum staff of four persons.

I

An analysis of this case necessarily begins with the challenged tax statute. RCW 82.04.220 imposes a business and occupation tax for "the act or privilege of engaging in business activities". For wholesale and retain sales, the tax is measured by the application of rates against the gross proceeds of sales. RCW 82.04.220. During the audit period, the amount of the tax was computed as the gross proceeds of sales of the business multiplied by the rate of forty-four one-hundredths of 1 percent. RCW 82.04.250; RCW 82.04.270(1). "'Gross proceeds of sales' means the value

proceeding or accruing from the sale of tangible personal property and/or for services rendered," without any deduction for costs of material or labor or any other expenses. RCW 82.04.070.

The statute also provides for the deduction from the measure of tax amounts which the State is prohibited from taxing under the state or federal constitution. RCW 82.04.430(6) (subsequently recodified as RCW 82.04.4286). Thus, if this tax were in violation of the due process or commerce clauses, it would also be in violation of RCW 82.04.430(6).

II

Turning first to the due process issue, we note that due process and commerce clause challenges, while theoretically different, are closely related. National Bellas Hess, Inc. v. Department of Rev., 386 U.S. 753, 18

L. Ed. 2d 505, 87 S. Ct. 1389 (1967). Therefore, much of our analysis here will be equally applicable to the commerce clause discussion and vice versa.

Due process focuses on whether a state is taxing beyond its jurisdictional reach. National Bellas Hess, at 756. The test applied to state taxation of interstate business under the due process clause is two pronged: (1) There must be a "minimal connection" or "nexus" between the interstate taxing activities and the tax state; and (2) the income attributed to the state for tax purposes must be rationally related to "'values connected with the taxing State.'" Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978); Mobile Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436-37, 63 L. Ed. 2d 510, 100 S. Ct. 1223 (1980); Exxon Corp.

v. Department of Rev., 447 U.S. 207, 219-20, 65 L. Ed. 2d 66, 100 S. Ct. 2109 (1980). Nexus is established if the corporation "avails itself of the 'substantial privilege of carrying on business' within the State". Mobil, at 437, quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444-45, 85 L. Ed. 267, 61 S. Ct. 246, 130 A.L.R. 1229 (1940).

CBI has isolated the 16 contracts in this action because the Seattle sales office was not involved in the contract procurement activities. Yet, United States Supreme Court cases reveal that the presence and participation of a sales office in state is not decisive in determining the existence of nexus.

In Standard Pressed Steel Co. v. Department of Rev., 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975), the absence of a sales office in state did

not insulate an out-of-state manufacturer from paying Washington's business and occupation tax on items sold to a Washington customer. Nexus was established through the presence of an engineer in Washington who, while not involved in the sales, routinely consulted with the customer regarding its needs for the manufactured product.

In General Motors Corp. v. Washington, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964), the out-of-state manufacturer employed in-state, district managers who supervised the independent dealers and in-state service representatives who assisted in any trouble experienced. In addition, some out-of-state personnel performed activities in state and General Motors maintained a parts warehouse in Seattle. The Court concluded that such a

maze of local connections prohibited the corporation from claiming tax immunity as an interstate business. Nexus is established if in-state services are substantial "with relation to the establishment and maintenance of sales, upon which the tax was measured." General Motors, at 447.

It is only when activities in the state are in no way connected with the business taxed that nexus has been found to be absent. This was the case in Norton Co. v. Department of Rev., 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (1951). No nexus was found in Norton for orders sent directly to an out-of-state manufacturer, filled there, and shipped directly to the customer, even though there was a sales office in the taxing state. This conclusion was premised on

the absence of any connection between the local office and the interstate sales.

The instant case is similar to Standard Pressed Steel and General Motors. CBI employs a number of individuals in Washington who supervise the site preparation and installation of its products, and who are available if problems arise. It also maintains a warehouse of equipment for installation and maintenance of its products. Such activities demonstrate that CBI has availed itself of the substantial privilege of doing business in Washington. See Mobil Oil Corp. v. Commissioner of Taxes, supra. Also shown in the substantial relationship between CBI's in-state services and the establishment and maintenance of sales upon which the tax was measured. See General Motors Corp. v. Washington,

supra. Unlike Norton where the customer had no contact with in-state, corporate personnel, CBI employs supervisors in Washington who have direct contact with the customer. There is also a close connection between the product itself and the state, as the structures are custom designed for use by Washington customers and are permanently installed here. Thus, nexus is firmly established.

While CBI does not strongly contest nexus as to 13 of the 16 contracts, it does assert that no nexus was established as to Kamyr contracts. As stated above, these 6 contracts bifurcated the design and manufacturing of three products from their installation. Hence, CBI argues that the 3 contracts covering only the design and manufacturing phase have no nexus with Washington. We disagree.

These contracts have sufficient "minimal connections" with Washington for a number of reasons. First, the products were custom made for a customer in Washington, and with the knowledge they were to be permanently installed in this state. This is substantially more than mere knowledge that fungible product in the stream of commerce is destined for use in the taxing state. See American Oil Co. v. Neill, 380 U.S. 451, 14 L. Ed. 2d 1, 85 S. Ct. 1130 (1965).

Second, once a corporation enters a state to do local business and has submitted itself to the taxing power of the State, it is the corporation's burden to exempt itself from the local tax by showing no in-state activities were asssociated with the interstate business. Norton, at 537; American Oil Co. v. Neill, supra. To meet this

burden, a corporation must show that its in-state services were not decisive in establishing and holding the market. General Motors, at 448; Norton, at 538. This CBI has failed to do. In our opinion, it defies common sense to say the presence of a local office, full-time supervisors, and a warehouse containing installation and maintenance equipment did not play a role in CBI's successful attainment of these contracts. The value of the goodwill imparted by local personnel and the value of their presence should problems arise cannot be under estimated in the context of contracts for permanent structures worth thousands of dollars.

Furthermore, CBI's isolation, for taxing purposes, of its contracts for design and manufacturing from those for installation appears an exaltation of

form over substance. See Time Oil Co. v. State, 79 Wn.2d 143, 483 P.2d 628 (1971). On several occasions the United States Supreme Court has recognized that a company's internal accounting techniques are not binding on a state for tax purposes. See. e.g., Exxon Corp. v. Department of Rev., supra. As was stated in Mobil Oil Corp. v. Commissioner of Taxes, supra at 438:

> [S]eparate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale."

These Kamyr contracts were entered into with sister corporations, and the bifurcation was done at the request of the purchaser. Moreover, a single,

lump-sum price was negotiated for the entire project, as with all other CBI contracts. Thus, from CBI's standpoint, and from the standpoint of CBI's taxation obligation, the contracts are indistinguishable from all the others. In short, no less than with the other contracts, CBI's presence in the state was undoubtedly a factor in the procurement of all six contracts for the three Kamyr projects. Therefore, nexus existed for each of the three Kamyr projects and the taxing authority properly treated the lump-sum proceeds as subject to the B & O tax.

Under the second prong of the due process test, a tax must be rationally related to "'values connected with the taxing State.'" Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978). This

requirement is met if the state's taxing formula is not inherently arbitrary and does not tax a proporation of the taxpayer's income "'out of all appropriate proportion to the business transacted . . . in that State". Exxon Corp. v. Department of Rev., supra at 227; Moorman, at 273-74. Arithmetical perfection is not required. Moorman, at 286 (Powell, J., dissenting).

Washington's B & O tax on interstate businesses has previously been held valid under this due process test. See General Motors Corp. v. Washington, supra. The formula is neither arbitrary nor all out of proportion to the business activities within the state, for it is collected only upon the gross proceeds of sales "in this state". WAC 458-20-193 B. No such tax is assessed against interstate sales to other states. Hence the tax is

inherently proportioned to in-state activities.

CBI argues rigorously that it is immune from the B & O tax because the contract "procurement" activities occurred outside Washington, thus leading to the conclusion that no "sales" activities occurred in state. RCW 82.04.250. Such an argument ignores the practicalities of modern business practice. As many corporations engage in business and maintain branch offices in numerous foreign jurisdictions, it is not surprising that contracts are negotiated and signed at locations other than the jursidiction for which the product is intended. See Fibreboard Paper Prods. Corp. v. State, 66 Wn.2d 87, 401 P.2d 623 (1965). Corporate convenience, however, is not controlling in the context of the incidence of a tax. Were it otherwise,

substantial taxes could be avoided simply by consummating all contracts outside the borders of the taxing state.

That the B & O tax formula results in taxation of some income which did not have its source within the taxing state does not render it "out of all proportion" under a due process analysis. Moorman Mfg. Co. v. Bair, at 272. In Moorman, the United States Supreme Court upheld as constitutional a tax formula that occassionally over-reflected or under-reflected income attributable to the taxing state. Despite this "imprecision," the Court "refused to impose strict constitutional restraints on a State's selection of a particular formula." Moorman, at 273; see also Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 65 L. Ed. 165, 41 S. Ct. 45 (1920); Bass, Ratcliff &

Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271, 69 L. Ed. 282, 45 S. Ct. 82 (1924); Ford Motor Co. v. Beauchamp, 308 U.S. 331, 84 L. Ed. 304, 60 S. Ct. 273 (1939).

In short, states have broad latitude under the due process clause to tax as a means of distributing the burden of the cost of government, not simply as an assessment of benefits received by foreign corporations. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981). Washington's B & O tax is sufficiently tied to the privilege of doing business within the state to meet the due process requirements.

In individual cases, the United States Supreme Court has found a tax formula, while valid on its face, may violate the due process clause when

applied to a particular taxpayer. See Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123, 75 L. Ed. 879, 51 S. Ct. 385 (1931); Norfolk & W. Ry. v. Missouri State Tax Comm'n, 390 U.S. 317, 19 L. Ed. 2d 1201, 88 S. Ct. 995 (1968). In each of these cases, however, it has been the taxpayer's burden to prove by "clear and cogent evidence" that the tax was "out of all appropriate proportion to the business transacted" within the state, Hans Rees', at 135, or had "led to a grossly distorted result," Norfolk, at 326. CBI has not met this burden. As stated above, we find CBI's presence and activities in the state, the fact that the sales involved products designed for and permanently installed in Washington, and the fact that Washington's tax reaches only sales made to customers in

the state, combine to rebut any allegations that the tax is "all out of proportion" to the in-state business. Thus, we conclude CBI's due process challenge must fail.

III

Next, we address CBI's challenge under the commerce clause. U.S. Const. art. 1, § 8, cl. 3. Theoretically, a commerce clause challenge is a claim that a tax as applied impedes commerce by giving a state more than its fair share of a generally applicable tax. National Bellas Hess, Inc. v. Department of Rev., 386 U.S. 753, 18 L. Ed. 2d 505, 87 S. Ct. 1389 (1967). It has long been recognized, however, that "'[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the

cost of doing the business.'" General Motors Corp. v. Washington, 377 U.S. 436, 439, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964) quoting Western Live Stock v. Bureau of Rev., 303 U.S. 250, 254, 82 L. Ed. 823, 58 S. Ct. 546, 115 A.L.R. 944 (1938). "[I]nterstate business must pay its way". Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252, 259, 63 L. Ed. 590, 39 S. Ct. 265 (1919).

The four commerce clause requirements for a state tax on interstate commerce are set forth in the seminal case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278-82, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977): (1) There must be a sufficient connection or nexus between the interstate activities and the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce;

and (4) the tax must be fairly related to the services provided by the state.

The first, nexus requirement was established in the due process discussion, supra. The analysis is equally applicable in the context of the commerce clause, and needs no further elaboration.

The second, apportionment requirement is the true focus of CBI's challenge. CBI argues that a B & O tax measured against 100 percent of the gross proceeds of sales is not a fair apportionment; in fact, CBI asserts that it is not apportioned at all. This argument, however, appears to misunderstand both the nature of Washington's tax and the holdings of recent United States Supreme Court cases.

An examination of United States Supreme Court cases which have previously

upheld Washington's B & O tax against a commerce clause challenge is useful to understand the apportionment requirement. In General Motors Corp. v. Washington, supra, appellants unsuccessfully challerged the B & O wholesale tax imposed on its products manufactured out of state. The Court stated:

> the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. . . . [T]he question is whether the State has exerted its [taxation] power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded.

(Italics ours.) General Motors, at 440-41. Thus, a corporation's "activities" within a state are not necessarily limited to acts done while physically within its boundaries if the activities have the consequence of affording the actor opportunities and protections of the state. In addition, General Motors emphasized that once a corporation has entered a state and engaged in activities therein, it has the burden of showing that the transactions for which it claims tax immunity are "'dissociated from the local business". General Motors, at 441, quoting Norton Co. v. Department of Rev., at 537.

Washington's B & O tax was again challenged in Standard Pressed Steel Co. v. Department of Rev., 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975). Standard Pressed Steel involved an

out-of-state corporation that manufactured products sold to the Boeing Company in Seattle, Washington. The corporation's only presence in the state was an engineer who consulted with Boeing regarding its needs for the product and followed up on any difficulties after delivery. The engineer was not, however, involved in the actual sales and he had no office other than his home. Nonetheless, the Court held that these activities were "substantial 'with relation to the establishment and maintenance of sales, upon which the tax was measured". Standard Pressed Steel, at 563, quoting General Motors, at 447. The Court held that the activities of the in-state employee were necessary in obtaining and retaining goodwill and rapport with Boeing, in addition to his more tangible functions. Furthermore,

because the B & O tax was upon gross receipts from sales made to a local consumer, and not upon the entire volume of the interstate commerce in which the corporation participated, the Court concluded the tax was "'apportioned exactly to the activities taxed,' all of which are intrastate." Standard Pressed Steel, at 564, quoting Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 440, 83 L. Ed. 272, 59 S. Ct. 325 (1939).

The most recent United States Supreme Court case addressing Washington's B & O tax is Department of Rev. v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978). In that case, the 4-part test articulated in Complete Auto Transit, Inc. v. Brady, supra, was applied for the first time to Washington's tax. The Court concluded that the B & O tax on in-state

stevedoring activities was constitutional. Equally important to the present action, the Court emphasized that "a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government." Stevedoring, at 748.

These cases compel the conclusion that the B & O tax as applied to CBI is justly apportioned to meet a commerce clause challenge. In designing and manufacturing products destined for permanent installation in Washington, CBI enjoyed the sales opportunities offered by Washington's economy and the general protections afforded to interstate businesses with local incidents. Hence, a special relation exists. See General Motors Corp. v. Washington, supra.

In addition, as CBI has established a local office here, it must sustain the

burden of dissociating its transactions for which its claims tax immunity. General Motors Corp. v. Washington, supra. This burden has not been met. CBI's local involvement in site preparation and overall supervision of the contracts contradicts any disassociation argument. Moreover, although the Seattle sales office was not involved in the contract procurement, it was involved in the passive sense of being present, aware of the transaction, and available to assist if necessary. Local CBI personnel were also available to resolve any difficulties with the product and maintain the goodwill of the customer. We find that these activities had a substantial relation to the establishment and maintenance of the sales upon which the tax was measured. See Standard Pressed Steel Co. v.

Department of Rev., supra. Finally, the tax was assessed only upon the gross receipts of sales made to Washington customers and not on the entire volume of CBI's interstate commerce. See Standard Pressed Steel Co. v. Department of Rev., supra. For all these reasons, we find it was fairly apportioned to the activities taxed.

CBI suggests the continued validity of General Motors, Standard Pressed Steel, Complete Auto Transit, and Stevedoring has brought into question by the recent cases of Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 63 L. Ed. 2d 510, 100 S. Ct. 1223 (1980) and Exxon Corp. v. Department of Rev., 447 U.S. 207, 65 L. Ed. 2d 66, 100 S. Ct. 2109 (1980) which, CBI argues, mandate a different apportionment formula. We find, however, that Mobil and Exxon do

not undercut prior case law, are distinguishable on their facts, and are consistent with the conclusions reached herein.

In analyzing Mobil and Exxon it is imperative to remember those cases address a taxing formula distinctly different from Washington's B & O tax. Unlike Washington's tax that attaches only to sales in Washington, the state tax formulas analyzed in Mobil and Exxon used as their tax base all net income of the corporation, regardless of where it was earned. These formulas are necessarily different from a gross proceeds tax which uses as its base only that portion of the business' income that is derived from sales to customers in that state.

Mobil and Exxon established the rule that a state may include income from

foreign income sources in its net income base, if the taxing formula is apportioned to reflect a "rough approximation" of the corporate income "'reasonably related to the activities conducted within the taxing State.'" Exxon, at 223; Mobil Oil Corp. v. Commissioner of Taxes, supra. The holdings in Mobil and Exxon prevent a business from using geographically discrete accounting methods to immunize portions of its operations from a net income tax base. Thus, these cases reject geographical accounting as a means of segregating the value of out-of-state operations from the measure of a net income tax. An appropriate analogy here is the rejection of CBI's attempt to geographically segregate the value of its out-of-state operations from the measure of Washington's B & O tax. Hence,

contrary to CBI's assertion, these cases do not support its position.

To summarize the apportionment discussion, we view Washington's B & O tax on gross proceeds of sales as inherently apportioned because it taxes only sales in Washington, not the total volume of sales made by an interstate business. Although the formula may result in taxation of some income not generated within the state, an exact apportionment formula is not constitutionally required. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978). Separate geographic accounting is not constitutionally required for the purpose of state taxation; attempts to isolate income received from various states may fail to account for intangible contributions. Mobil, at 438.

Therefore, Washington's B & O tax is sufficiently apportioned for the purposes of the commerce clause.

The third prong of the Complete Auto Transit tests is the requirement that the tax not discriminate against interstate commerce. A state tax on interstate commerce is not discriminatory unless it affords a "differential tax treatment of interstate and intrastate commerce". Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981); Maryland v. Louisana, 451 U.S. 725, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981). Washington's tax treats intrastate and interstate businesses equally, making no distinction between them. See RCW 82.04. Both intrastate and interstate businesses are taxed only once on their gross proceeds, not separately for each transaction as a

manufacturer, wholesaler, or retailer. RCW 82.04.440.

CBI argues, however, that it is discriminated against because it is subject to the risk of double taxation: taxation by the state where the product is manufactured, as well as taxation by Washington for the sale. Recent cases have indicated, however, that a "risk" of multiple taxation is not sufficient grounds for declaring a tax unconstitutional. See Mobil Oil Corp. v. Commissioner of Taxes, supra; Exxon Corp. v. Department of Rev., supra.

While CBI paid taxes in other states under formulas based on net income, as well as Washington's tax based on the gross proceeds of sale, the actual duplication of taxes was, by CBI's own calculations, minimal. More importantly, the commerce clause does not prohibit

such overlaps in the computation of taxable income by the states. Moorman Mfg. Co. v. Bair, at 278. If the constitution were read to mandate precision, the judiciary would be required to impose national, uniform rules for the division of income. This the United States Supreme Court has expressly declined to do. Moorman, at 278-81. Instead, the Court has recognized the freedom of states to formulate independent policies, together with their potential for overlap, until such time as Congress determines the need for uniformity and enacts, under its power granted by the commerce clause, the appropriate legislation. Moorman, at 280. Likewise, we see no need to strike down our own State's taxing system, as it is constitutionally valid,

simply because it is not in conformity with other states' schemes.

CBI's position is articulated in dissenting opinions of some United States Supreme Court Justices. Justice Brennan has aruged that a tax on the gross receipts from an activity of which only part occurred within the taxing state's border is not fairly apportioned. General Motors Corp. v. Washington, 377 U.S. 436, 450-51, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964) (Brennan, J., dissenting). Justice Powell believes the use of a tax different from those used by other states does, in practical effect, discriminate against interstate commerce. Moorman, at 288-89 (Powell, J., dissenting). He also believes it appropriate for the Court to invalidate states' statutes that burden interstate commerce by virtue of their nonconformity

with other states' regulations. Moorman, at 293-97 (Powell, J., dissenting).

Nevertheless, it is the view of the majority that is controlling. In Moorman, the majority unequivocally stated that exact precision and conformity in taxation is not required. It recognized that some risk of duplicative taxation exists "whenever the States in which a corporation does business do not follow identical rules". Moorman, at 278. Yet its conclusion was that as long as a state's tax formula treats both local and interstate commerce alike, the alleged disparity in taxes borne by interstate businessess is the consequence of the combined effect of different states' laws, and is not attributed to any particular state's statutes. Moorman, at 277 n.12. On this basis, we hold here that Washington's

B & O tax is not discriminatory under the commerce clause.

The fourth and final prong, the requirement that the tax be fairly related to the services provided by the state, is easily met. This requirement does not address the rate or amount of the tax, nor does it look to the actual value of the services in relation to the actual taxable activities engaged in. Commonwealth Edison Co. v. Montana, at 622. Instead, it is closely connected to the first prong, the nexus requirement. Commonwealth Edison Co. v. Montana, supra. It requires that the measure of the tax, as well as its incidence, be "'tied to the earnings which the State . . . has made possible'". Commonwealth Edison, at 626, quoting Wisconsin v. J.C. Penney Co., 311

U.S. 435, 446, 85 L. Ed. 267, 61 S. Ct. 246, 130 A.L.R. 1229 (1940).

That tie exists here. In addition to the presence of an office in Seattle, a warehouse in Tacoma, and full- and part-time personnel at the installation sites of CBI's products, CBI uses Washington roads and transportation facilities, and all the government services associated with a large scale construction project each time it sells a product to a Washington consumer. Services provided by the State also include police and fire protection, the presence of a trained work force, and the general "advantages of a civilized society". Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 60 L. Ed. 2d 336, 99 S. Ct. 1813 (1979). All such services are properly considered under the commerce clause. Japan Line, Ltd. v.

County of Los Angeles, supra. As the measure of the B & O tax is based solely on gross proceeds of sales to customers in this state, it is closely "tied" to the earnings which the State has made possible.

Finding all four prongs of the Complete Auto Transit test satisfied, we hold that Washington's B & O tax is constitutional under the commerce clause.

IV

In matters involving the federal constitution, the State Supreme Court is bound to follow the decisions of the United States Supreme Court. See B.F. Goodrich Co. v. State, 38 Wn.2d 663, 676, 231 P.2d 325 (1951). Nonetheless, our previous cases are consistent with the result reached herein.

In B.F. Goodrich, this Court followed the then recent decision of Norton Co. v.

Department of Rev., 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (1951) to hold that income from orders sent directly to an out-of-state manufacturer, with shipment made directly to the consumer in return, was not reasonably attributed to the local business, and hence was not subject to Washington's B & O tax. CBI views B. F. Goodrich as favoring its position, for we stated therein that "such a tax may not be levied upon the proceeds from sales with which the local outlet had nothing to do." B.F. Goodrich, at 675. CBI analogizes that its Seattle sales office was not involved in the procurement of the contracts here.

We do not, however, read the term "local outlet" so narrowly. In Standard Pressed Steel Co. v. Department of Rev., 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975), an employee without a local

"office" who consulted with the local customer, addressed any difficulties with the product, and imparted goodwill which contributed to establishing and holding the market represented a sufficient nexus with the State to permit a B & O tax on sales to the local customer, even though the employee was not directly involved in placing, filling or receiving the orders. Similarly, CBI's activities in this state are inexorably entwined with the establishing and holding of the local market. The sum of its activities are certainly equivalent, for taxing purposes, to the involvement of a "local outlet".

In Fibreboard Paper Prods. Corp. v. State, 66 Wn.2d 87, 401 P.2d 623 (1965), appellants made an argument substantially similar to the one made by CBI. Fibreboard demonstrated that a number of

sales made to in-state customers involved sales activities with out-of-state offices of the corporate customer. Fibreboard, at 91-92. Hence, Fibreboard argued, the percentage of its sales activities taking place out of state was exempt from the B & O tax based on privilege of engaging in business activities in state. This argument was rejected, however, under the reasoning of General Motors Corp. v. State, 60 Wn.2d 862, 376 P.2d 843 (1962), aff'd, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964). General Motors placed the burden on a taxpayer with business activities within the state to show other activities allegedly immune from taxation are "disassociated from the sales in question." General Motors, at 875. Fibreboard did not sustain this burden, nor did CBI.

Finally, Time Oil Co. v. State, 79 Wn.2d 143, 483 P.2d 628 (1971) is consistent with recent United States Supreme Court cases that look to the substance rather than the form of the business' activities to determine the validity of a tax on interstate business. See Mobil Oil Corp. v. Commissioner of Taxes, supra; Exxon Corp. v. Department of Rev., supra. The focus in the Time Oil case, as it is here, was "whether the transactions involved constitute a taxable business activity within the contemplation of the business and occupation tax statutes." Time Oil, at 146. This court concluded that "the legislature intended to impose the business and occupation tax upon virtually all business activities carried on within the state." Time Oil, at 146. That same conclusion is valid today.

V

To summarize, we find Washington's B & O tax on the privilege of doing business in Washington constitutionally valid under state and federal due process clauses and under the federal commerce clause. We also find the tax, as applied to CBI herein, meets the constitutional prerequisites for a tax on interstate business. We affirm.

WILLIAMS, C.J., and ROSELLINI, STAFFORD, UTTER, DOLLIVER, DORE, DIMMICK, and PEARSON, J.J., concur.

APPENDIX 2

MEMORANDUM OPINION OF
SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CHICAGO BRIDGE AND IRON COMPANY,	)	NO. 55347
Plaintiffs,	)	MEMORANDUM OPINION
vs.	)	
STATE OF WASHINGTON,	)	
Defendants.	)	

This matter came regularly on for hearing before the above-entitled Court, and the Court having read all Opening Briefs and respective Reply Briefs, having further examined the Stipulation of Facts and the Supplemental Stipulation, the pertinent exhibits herein, studied the entire record and

entertained oral argument on the issues, now enters its Memorandum Opinion as follows:

Notice of Appeal was filed with this Court in August, 1976, and since that time there has been voluminous discovery and fact finding which culminated in this hearing over four years later. The briefings are exceptionally well done and thorough. The Court is well aware of the monumental efforts which have been exemplified by the parties and their counsel.

Initially, the primary question before the Court is whether the imposition of the B & O tax levied by the State is unconstitutional as violative of the Commerce Clause and/or a denial of due process or equal protection under the 14th Amendment of the U.S. Constitution.

Throughout the audit period, January 1, 1967 through March 31, 1975, CBI was in the business of designing, engineering, manufacturing and installing large, welded steel customized products pursuant to written contracts with its customers. (St. 8.)

All design, engineering and manufacturing work required for all sixteen contracts were performed outside the State of Washington. (St. 24, 68, 120.) We deal here specifically with sixteen (16) contracts which have been protested by the taxpayer.

Three contracts between CBI and Kamyr, Inc., did not involve installation of CBI. All work by CBI for these contracts took pace outside the State of Washington except for the interstate shipment of the property into Washington. (St. 172.)

The remaining thirteen contracts provided for installation (or in one the case some sub-assembly work) within the State of Washington. CBI does not contest the imposition of a B & O tax thereon, but allege such tax be limited and be fairly apportioned for in-state installation work only.

It is claimed that the disputed contracts were negotiated and consumated outside the state without actual or direct participation by the taxpayer's Seattle sales office. The contracts here in question vary in detail and inform but are distinguished from unprotested contracts on the basis that neither the negotiation for nor the formalization of the contracts took place within the Seattle sales office, (St. 169) but from other sale offices throughout the country.

The Seattle sales office is responsible for customers whose purchasing offices are located in Alaska, Washington, Oregon, Idaho and Montana. Normally, customers contracted with CBI through the Seattle office. As stated, the Seattle sales office was not involved in any aspect with the contracts included in this action. However, pursuant to a general CBI practice, Seattle was often informed as a matter of courtesy by other CBI district offices of contracts obtained and of which contracts involved installation work within the customer territory of the Seattle sales office. The Seattle sales office usually received this information through informational copies of contract documents or correspondence.

In addition, when a CBI bid was made to a customer's representative located

outside the geographic area in which the product was to be delivered or installed, a courtesy copy of the proposal was usually sent by the contracting engineer responsible for the contract to the district sales office in whose geographic customer territory the product would be delivered or installed.

CBI has not contested the imposition of B & O tax on contracts for which installation took place within the State of Washington when the Seattle sales office participated in the procurement of such contracts. (St. 18.)

The taxpayer also maintains a Tacoma warehouse for central storage and routine maintenance of construction equipment used in the installation of its products. During the audit period the Tacoma warehouse had a maximum staff of four persons. Installation equipment

from that facility was available for shipment to any installation site in any of the states in the western district of CBI's Western Area Operations Department. (St. 28, 29, 30, 31.)

CBI's X-Ray Division in Seattle designs, manufactures and repairs X-ray equipment for use solely within the CBI company structure. Seattle X-Ray manufactures x-ray equipment for use in CBI manufacturing facilities as well as at installation sites. The Seattle facility has responsibility for the supply of x-ray equipment to CBI's manufacturing plants and construction offices world-wide. This responsibility includes maintaining inventory control of the location of approximately 350 x-ray machines located in warehouses around the world. During the audit period the

Seattle facility employed from 6 to 12 employees. (St. 33-38.)

The question of pier nose liners is also at issue, for it has been stipulated that all work undertaken for the pier nose liners took place at CBI's facilities outside the State of Washington. (St. 117.) However, it is also stipulated that the overall chief Joseph Dam project of which the pier liners were but a small part involved the Seattle sales office by way of coordination of meetings and the proposing to the Corp of Engineers an additional contract for some of the areas of work necessary for the project. (St. 119.) The Court understands that any dispute concerning what constitutes a "Nuclear Fuel Assembly" has been deleted from this cause, and thus no penalties are involved.

When dealing with the B & O tax, we are concerned with an excise tax which the State imposes on the privilege of engaging in businss activities. It applies to both wholesale and retail sales made within the State. The tax is measured by the gross proceeds of sales of the business conducted within the State. Whether retail or wholesale the tax formula is the same. The tax does not involve a tax upon a tangible object, but upon the activity of making sales, and although CBI sold and delivered personal properties to customers within the State, nevertheless, the tax is not upon the property but upon the privilege of selling. (See RCW 82.04.040, 050, 060, 070, 220, 250, 270 (1)).

Having thus determined the status of the B & O tax within this State, we turn now to the Commerce Clause and alleged

violations of the 14th Amendment. The standards under each of the constitutional requirements involve interpretations, under the law, of nexus, apportionment and multiple taxation including the legal principle "risk".

As to due process the Courts have for many years imposed the test of whether the privilege of conducting business activity within the State is such as to be offset by what benefits the State provides the taxpayer.

> "The test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." Wisconsin v. J. C. Penney, 311 U.S. 435.

Plaintiff alleges that as to the three Kamyr contracts there was no sales

activity in this State sufficient to provide any nexus for each lacks a minimal relationship or nexus to impose the tax.

Recently in Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 63 L. Ed. 510, the Court in discussing the due process clause and nexus, held that the Constitutional requirements are a "minimal connection" between the interstate activities and the taxing state, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise.

Turning to the Commerce Clause, the requirements are similar, but additional factors are to be considered. As it was stated in Washington Revenue Department v. Stevedoring Association, 435 U.S. 734:

> ". . . [T]he constitutionality under the commerce clause of the application of the Washington business and occupation tax to stevedoring depends upon the practical effect of the exaction. As was recognized in Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 82 L. Ed. 823, 58 S. Ct. 546 (1938), interstate commerce must bear its fair share of the state tax burden. The court repeatedly has sustained taxes that are applied to activity with a substantial nexus with the state, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State. [citations omitted]." 435 U.S. at 750 (Emphasis supplied)."

To this point, both the due process clause and the Commerce Clause require nexus. With the requirements to find nexus in mind, the case of Standard

Pressed Steel v. Department of Revenue, 419 U.S. 560 is determinative of the Kamyr contracts. There the foreign corporation had no offices in the state and the product was developed and constructed outside this state. Orders were made directly to the company out of state and the product delivered directly to the customer within this state. Pressed Steel, however, had one employee who operated out of his home, was paid a salary, took no orders, but followed up on the deliveries and consulted with the customer from time to time as to its needs. It was argued that there was not a minimal connection nor a sufficient rational relationship to find sufficient nexus. The Court disagreed and stated:

> "Appellant argues that imposition of the tax violates due process because the in-state activities were so thin

> and inconsequential as to make the tax on activities occurring beyond the borders of this State one which has no reasonable relation to the protection and benefits conferred by the taxing state (Citing Wisconsin v. J. C. Penney Co.). In other words the question is 'whether the state has given anything for which it can ask return,' (citation omitted). We think the question in the context of the present case verges on the frivolous. For appellant's employee, Martinson, with a full-time job within the state, made possible the realization and continuance of valuable contractual relations between appellant and Boeing." 419 U.S. at 562.

Certainly the employee in Standard Pressed Steel, supra, had nothing to do with contracts, had no participation or control in the manufacture, design or completion of the products sold within

the State. You might say he was just here as an employee for the purpose of public relations with customers to whom they were doing business. The employee had nothing to do with the sales, in fact, but we are not here taxing the sale or sales but taxing the privilege of engaging in business activities.

Under Standard Pressed Steel, supra, the presence of the company conglomerate within the state constitutes doing business. It is admitted that there is a Seattle sales office, that there is a warehouse in Tacoma and an X-Ray Division in Seattle. The fact that this presence existed on a continuous basis for purposes known to CBI is sufficient. The fact that none of these entities participated in these contracts is of no consequence.

Plaintiff alleges that Standard Pressed Steel, supra, does not apply to this case as no sales activity in Washington was associated with the contracts to provide nexus and, further, that these three contracts lacked a minimal relationship or nexus to the state sufficient to impose the tax. The Court finds otherwise.

The Court is of the belief that you cannot just look to the contracts to determine nexus. We must look to the activities of doing business in the State in a more general sense. The continuous availability of the facilities within the State, established, offering services and general participation throughout the general operation of CBI is sufficient, admitting the lack of in-state participation as to these three contracts.

CBI, admittedly doing business within the State in the overall sense, should not be permitted to pick and choose their contractual relations to be within or without tax consequences. It cannot hide behind a unilateral determination to accept or reject the tax liabilities. The tax is based upon a continuance activity, not upon a segregated or partitioned part of such general activity. CBI is here and doing business and the tax is not dependent upon each contract or upon out-state development of the individual personal property when that property is sold to in-state customers and finds its final resting place within the boundaries of this State. Therefore, as to the element of nexus, the requirements are satisfied both as to due process and under the provisions of the Commerce Clause. There

is sufficient sales activity and adequate minimal relationship.

The Commerce Clause has additional requirements over and above those standards which must be met under due process. Specifically, the Court refers to the requirements of fair apportionment, lack of discrimination against such interstate commerce and that such activity must fairly relate to the services provided by the State.

Is the B & O tax as measured and assessed fairly apportioned? In discussing apportionment, it should be kept in mind the State is not here taxing income but the privileged of engaging in business activities. Plaintiff claims that there must be apportionment and division of the B & O tax simliarly to that applied in income tax cases. Mobil Oil Corp. v. Commissioner of Taxes,

supra, and Exxon Corp. v. Wisconsin Department of Revenue, 65 L. Ed. 2d 66, are relied upon by CBI to not only necessitate apportionment but to advance alternate formulas to accomplish it. Here the tax is imposed upon the privilege of making the sales which are consumated by the delivery of the product within the State. It is difficult to compare the two different taxes for in the income tax sense there must be built in varied apportionment standards while the B & O tax is directed purely to the local transaction for which there exists built in apportionment. We deal with the privilege of consummating the sale within the State by delivery of the finished product of which the customer has bargained.

This tax applies only to sales consummated within this State and upon

the delivery of the property. The tax, measured by gross receipts, is not on the delivery alone but upon the marketing activity within the State. As to such competed product produced for the customer, certainly the state has the initial right of taxation for it be the State of destination. The tax base, by necessity, is independent as related to other states taxing powers, the tax being only on sales consummated within the State. CBI is not faced with double taxation or the risk thereof.

If you assume that B & O tax is imposed upon the activity of making sales within this State, then there is a distinct difference, and the income tax analogy falls short. Such tax is on profit derived from the entire business transactions of CBI. Local income must be segregated from out-state income. Not

so with the B & O tax for by using gross receipts there is no need for apportionment, it has its own. The tax here is already apportioned in direct relation to the activities of CBI within the State. Mobil & Exxon are not applicable.

It is alleged that CBI suffers under a multiple tax burden. However, such is not the case for the tax in question is applicable to all who engage, within the State, in the business of making sales whether they be at wholesale or retail. It is only the local activity which is being subjected to taxation and is applied to all those engaged in the same activity within this State. CBI being engaged in interstate commerce does not suffer any more than those involved with interstate commerce. There is no discrimination. See General Motors v.

State, 60 Wn.2d 862. No tax herein is attributed to CBI activities without the State. There is no violation of the Commerce Clause. All thireeen cases upon which is argued the question of apportionment as being violative of the Commerce Clause is without merit.

In light of the above and foregoing, the pier nose liners must suffer the same fate.

The Court will dismiss the action of the plaintiff, and will sign the appropriate pleadings upon presentation.

Dated at Olympia, Washington, this 18th day of March, 1981.

s/FRANK E. BAKER, JUDGE

APPENDIX 3

FINDINGS OF FACT AND CONCLUSIONS
OF LAW OF SUPERIOR COURT OF
WASHINGTON FOR THURSTON COUNTY

FILED IN CLERK'S OFFICE, SUPERIOR COURT, STATE OF WASHINGTON, SEPTEMBER 9, 1981.

SUPERIOR COURT, STATE OF WASHINGTON
COUNTY OF THURSTON

CHICAGO BRIDGE & IRON COMPANY,	)	NO. 55347
Plaintiff,	)	FINDINGS OF FACT AND
v.	)	CONCLUSIONS OF LAW
STATE OF WASHINGTON,	)	
Defendant.	)	

THIS MATTER came on regularly for hearing on January 13, 1981, before the Honorable Frank E. Baker, Judge of the above-entitled Court, sitting without a jury. Plaintiff was represented by its attorneys, LeSourd, Patten, Fleming, Hartung & Emory, Rodney J. Waldbaum and

Daniel D. Woo, and its corporate assistant counsel, Kent J. Schielke. Defendant was represented by Kenneth O. Eikenberry, Attorney General and by Karen Elledge and Andrew C. Harvard, Assistant Attorneys General. In accordance with the prior order of this Court, the parties have entered into a Stipulation, containing paragraph Nos. 1 through 237 and a Supplemental Stipulation, containing paragraph Nos. 238 through 241, in which they agreed only to the accuracy and admissibility of the facts and exhibits pertaining to this action, but reserved the right to argue before the Court their relevance and materiality. Neither party has moved to strike any of of stipulated facts, attachments or exhibits thereto. The Court has read the Stipulations and considered the evidence, records, and

files herein, and having heard and considered the arguments of counsel, has entered a written memorandum opinion. The Court now makes and sets forth the following:

FINDINGS OF FACT

The facts are as set forth in the Stipulation of Facts and the Supplemental Stipulation and the respective attachments and exhibits thereto, all as filed herein. Said Stipulation of Facts and Supplemental Stipulation, and attachments and exhibits thereto, are incorporated herein by this reference as Findings of Fact.

In particular, the Court finds the following ultimate facts as determinative of the outcome of this litigation:

1. Throughout the audit period at issue in this action, January 1, 1967 through March 31, 1975, plaintiff Chicago

Bridge & Iron Company (CBI) was in the business of designing, engineering, manufacturing and installing large, welded steel-plate custom products pursuant to written contracts with its customers. Although CBI's products might be similar in function and appearance, each product was unique and designed according to the specifications of the customer. CBI as a matter of policy contracts for all aspects of a job from design through installation.

2. CBI protests the assessment by the State of business and occupation tax on sixteen separate contracts. The products which are the subject of these contracts were designed, engineered, and fabricated by CBI in its facilities outside the State of Washington and then subsequently assembled, installed or delivered by CBI in Washington.

3. The sixteen contracts at issue are among a total of 149 contracts for products which CBI installed or delivered in Washington during the audit period but for which the design, engineering and manufacturing occurred outside the State of Washington. CBI voluntarily paid taxes on the remaining 133 contracts not at issue in this action, each of which either directly or indirectly involved CBI's Seattle Sales Office.

4. Although all of the contracts vary in detail and many vary in form, the principal distinction between the sixteen contracts included in this action and the other 133 contracts not protested is that neither the negotiation for, nor the formalization of, the contracts in this action took place within the State of Washington or involved CBI's Seattle Sales Office. The contracts included in

this action were negotiated and formalized through other sales offices throughout the country. In all other respects, CBI managed and performed these sixteen contracts, including the engineering and manufacturing of the products, in accordance with the standard procedures followed by CBI for all its contracts.

5. CBI's engineering, manufacturing and installation operations are functionally integrated and coordinated from the first proposal to a customer through each phase of the design, manufacturing and installation processes. This integration is accomplished through frequent communications among the separate divisions and departments of the company. The contracting engineer who procures a contract acts as the liaison

with the customer until delivery of the product. The construction supervisors responsible for installation are involved from the beginning of each contract. Engineers produce drawings appropriately designed to meet the needs of both the manufacturing and installation departments. Contract schedules are set up at the beginning of each contract, and each contract has a schedule coordinator responsible for seeing that all operations communicate with one another and are coordinated. The engineering, manufacturing and installation functions are coordinated with each other so that CBI may produce the largest possible subassemblies (prefabricated parts of the whole product) for the most cost-effective results.

6. The respective engineering, manufacturing and construction offices

assigned to a contract communicate with each other both initially and during the product's generation in order to deal with changes and problems. The information and exchange includes the sales offices. When a CBI bid was made to a customer's representative located outside the geographic area in which the product was to be delivered or installed, a courtesy copy of the proposal was usually sent by the contracting engineer responsible for the contract to the district sales office in whose geographic customer territory the product would be delivered or installed.

7. CBI's Seattle Sales Office is responsible for customers whose purchasing offices are located in Alaska, Washington, Oregon, Idaho and Montana and which contracted with CBI through those offices. The Seattle Sales Office was

not involved in any aspect of the contracts included in this action. However, pursuant to general CBI practice, the Seattle Sales Office was informed as a matter of courtesy by other CBI district sales offices of contracts which they obtained which also involved installation work within the customer territory of the Seattle Sales Office. The Seattle Sales Office received this information through informational copies of contract documents or correspondence.

8. Each of the products included in the contracts in this action required the ultimate assembly and welding together of fabricated steel subassemblies. CBI variously refers to this process as "construction", "installation", or "erection". Except for the products referred to in Finding No. 17, installation activity took place in

Washington for all products included in this action. When a CBI contract required installation of the product at the customer's site in the State of Washington, permanent CBI employees, foremen, were present at the installation site to supervise the installation function. CBI foremen are specially trained and experienced in the installation function and coordinate the installation process with the customer and the other operating divisions of CBI.

9. For the duration of each contract included in this action, CBI also assigned either a project manager or a construction supervisor responsible for installation and cost controls associated with the contract. These individuals generally perform a site survey at the installation site in Washington when the contract is first obtained. They also

visit the site during the installation process.

10. CBI hired from local Washington union hiring halls and paid through its own payrolls the employees who did the actual welding, moving of equipment and materials necessary to the installation of the products in Washington.

11. Other permanent CBI employees visited the Washington installation sites in order to maintain safety and training standards and insure that welders employed at the site performed according to the customer's specifications and CBI's standards. The performance of the welders was evaluated at the site through the use of CBI quality control equipment and CBI's permanent supervisory employees.

12. Beginning in 1969 and throughout the audit period, CBI maintained in Tacoma, Washington, a warehouse for the

central storage and routine maintenance of construction equipment used in the installation of its products. During the audit period, the Tacoma warehouse had a maximum staff of four persons. Installation equipment from that facility was available for shipment to any installation site in California, Utah, Oregon, Washington, Alaska, Hawaii, Idaho, Montana, Nevada, Arizona, Colorado, Wyoming, and part of New Mexico.

13. The main office of CBI's X-ray Division is located in Seattle. CBI's X-ray Division designs, manufactures and repairs x-ray equipment used solely by CBI operating divisions. The Seattle office manufactures x-ray equipment for use in CBI manufacturing facilities as well as at installation sites. The Seattle facility has responsibility for the supply of x-ray equipment to CBI's

manufacturing plants and construction offices worldwide. This responsibility includes maintaining inventory control of approximately 350 x-ray machines located in CBI warehouses around the world. During the audit period, the Seattle facility employed from six to twelve employees.

14. By letter dated September 19, 1973, CBI agreed to furnish, fabricate, deliver and erect three products for resale by Kamyr, Inc. to the Weyerhaeuser Paper Company. As a result of this agreement and as a product of the same series of negotiations, CBI entered into six separate written contracts. CBI executed three contracts with Kamyr, Inc. for the design, procurement of materials, and shop fabrication of the three products. CBI contemporaneously executed three corresponding contracts with Kamyr,

Inc.'s sister corporation, Kamyr Installations, Inc. for installation of the three products at Weyerhaeuser's facility at Everett, Washington. Taken together, the six contracts cover the design, procurement of materials, fabrication and installation by CBI of each of three products. The administration and performance of the design, material and fabrication contracts were internally integrated with the administration and performance of the installation contracts following standard CBI operations. All work for the three design, material, and fabrication contracts took place at CBI facilities outside the State of Washington except for the interstate shipment of the property into Washington. As to those three contracts, CBI maintains Washington has no jurisdiction to impose its B&O

tax. CBI does not contest the imposition of the Washington B&O tax upon the three corresponding installation contracts and those contracts are not contracts included in this action.

15. The remaining thirteen contracts at issue in the action provided for installation or subassembly work at installation sites in Washington. CBI concedes Washington B&O tax may be imposed on these remaining contracts. It protests imposition of the tax on the entire gross proceeds of each contract and contends the tax base must be reduced to relate the installation activity actually occurring within the State of Washington to the total contract price. All engineering and manufacturing for the products covered by these contracts was performed outside the State of Washington. For three of these thirteen

contracts, materials procured in Japan were fabricated in British Columbia, Canada at CBI's wholly-owned subsidiary, Horton, and shipped to the installation site in Washington.

16. CBI and Hitachi America, Ltd. negotiated an agreement for the supply and in some cases installation of certain turbine component parts for an expansion project of the Chief Joseph Dam on the Columbia River in Washington. Hitachi, for its own internal purposes, wanted to have separate written subcontracts for the sale (supply) of goods and for installation services.

17. The Hitachi supply subcontract required CBI to supply, F.O.B. jobsite, for unloading and installation by others, seven "pier noses". All the work undertaken pursuant to the supply subcontract for the pier noses took place

at CBI's facilities outside the State of Washington. The Hitachi supply subcontract also required CBI to supply, F.O.B. jobsite, for unloading and installation by others, eleven draft tube liners. The draft tube liners were required to be supplied in eight pieces, either shop assembled or assembled at the site. Because of the limitations upon the size of the subassemblies which could be shipped to the Chief Joseph Dam, CBI had to subassemble the draft tube liners into eight sections at the installation site rather than at the assigned manufacturing plant. The supply subcontract also required CBI to deliver subassemblies of eleven spiral cases and spiral case extensions to the Chief Joseph Dam.

18. The Hitachi installation subcontract required CBI to furnish all

labor, materials and supplies necessary for the field assembly, installation and test of the spiral cases and spiral case extensions, and the field assembly of the draft tube liners. The installation subcontract is not included in this action.

19. The complexities of the Chief Joseph Dam Project required the general contractors and subcontractors involved to meet to discuss the coordination of their various responsibilities. CBI was the general contractor for the penstocks of the dam pursuant to a separate contract negotiated by the Seattle Sales Office and not at issue in this action. The Seattle Sales Office participated in coordination meetings in that capacity. The overall Chief Joseph Dam project, of which the pier noses were but a small part, involved the Seattle Sales Office

by way of the coordination meetings and CBI proposals for additional contract work as the project progressed.

From the foregoing Findings of Fact and the Stipulation and Supplemental Stipulation entered into by the parties, the Court makes the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction of, and plaintiff has timely filed, this action pursuant to the provisions of RCW 82.32.180 and RCW 82.32.060.

2. RCW 82.04.220 imposes a business and occupation (B&O) tax for the act or privilege of engaging within this state in business activities of selling, manufacturing, extracting or providing services.

3. RCW 82.04.250 imposes B&O tax on the privilege of engaging within this

state in the business of making sales at retail. RCW 82.04.270(1) imposes B&O tax on the privilege of engaging within this state in the business of making sales at wholesale. Retailing and wholesaling B&O tax is measured by the gross proceeds of sales of the business conducted within this state.

4. The B&O tax is not a tax upon personal property sold and delivered to customers within the state. The tax imposed herein is upon the privilege of engaging in the business activity of selling within the state of Washington.

5. RCW 82.04.070 defines the measure of "gross proceeds of sales" as the value proceeding from the sale of tangible personal property and/or for services rendered without any deduction on account of the cost of property sold, the cost of materials used, labor costs,

interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

6. The Department of Revenue correctly classified the sales of products at issue in this action as either wholesale or retail sales in accordance with the provisions of RCW 82.04.250, and RCW 82.04.270, RCW 82.04.040, RCW 82.04.050, and RCW 82.04.060. RCW 82.04.460, which concerns apportionment of gross income from services rendered within this state, does not apply to the contracts included in this action.

7. RCW 82.04.4286 (formerly RCW 82.04.430(6)) provides that there may be deducted from the measure of the business and occupation tax those amounts which the state is prohibited from taxing under

the Constitution of this state or the Constitution or laws of the United States.

8. The due process and commerce clauses of the U.S. Constitution require that there be sufficient local contacts or nexus between a seller in interstate commerce and the state of Washington in order for the state of Washington to impose a tax on that seller measured by the gross proceeds of the sales of goods or services made to customers in the state of Washington.

9. Under the due process clause, a test is whether the taxing power exerted by the state bears fiscal relation to the protection, opportunities and benefits given by the state. For the state to tax gross receipts or income generated in interstate commerce, the due process clause of the fourteenth amendment imposes two requirements: a "minimal

connection" between the interstate activities and the taxing state, and a rational relationship between the income attributed to the state and the intrastate values of the enterprise.

10. Under the commerce clause, state taxes imposed on businesses engaged in interstate commerce will be sustained if the taxes are applied to activity with a substantial nexus with the state, they are fairly apportioned, they do not discriminate against interstate commerce, and they are fairly related to the services provided by the state.

11. The business activities and facilities of CBI in this state provide sufficient minimal contacts to establish the nexus required under the due process and commerce clauses for Washington to tax the interstate sales of the products and contracts included in this action.

12. In order to determine whether the state of Washington has sufficient nexus to impose its B&O tax upon the gross proceeds of a specific contract, consideration must be given to CBI's general activities within this state, as well as to CBI's particular activities with respect to the specific contract. The continuing presence and operation of CBI's Seattle Sales Office, Tacoma warehouse and Seattle X-ray division constitute doing business in the state of Washington and are sufficient to establish the constitutional requirements of nexus to impose the B&O tax upon the contracts at issue in this action. That none of the CBI offices in Washington participated in the contracts at issue in this action is of no constitutional significance to the presence or absence

of nexus to impose the B&O tax upon the contracts at issue.

13. The installation activities of CBI necessary to install the products covered by the contracts included in this action constitute sufficient minimal contacts to establish the nexus required to impose B&O tax on all the contracts at issue here.

14. Where extensive business activity occurs within a state, in order to remove from taxation a portion of sales it contends is not attributable to that business activity, the taxpayer must establish sufficient disassociation of that portion from the rest of its business activity within that state. With respect to CBI's activity relating to its sales to Kamyr and its sales of pier nose liners, CBI has established that the three Kamyr contracts cover only

design, material procurement, and shop fabrication, all of which took place at CBI facilities outside the state of Washington, and that the only activities within the state of Washington relating to either the Kamyr, Inc. contracts or CBI sale of pier nose liners was interstate delivery. This does not establish the requisite disassociation to remove these sales from Washington B&O taxation. The sale of pier nose liners and CBI's delivery to Kamyr, Inc. within the state, coupled with CBI's other business activity within the state, give the state of Washington sufficient nexus to impose its B&O tax upon these contracts. The fact that the pier nose liners' delivery by CBI was "F.O.B." into the state of Washington does not by disassociation deprive the state of Washington of sufficient nexus to impose

its B&O tax upon the gross proceeds from the design, engineering, manufacture and sale of those pier nose liners since CBI was engaged in business within the state of Washington and provided substantial installation activities within the state for the remaining products in the Chief Joseph Dam contract. That personal property was custom fabricated outside the state of Washington is not determinative of tax consequences when the fabricated property has been sold to customers doing business within and without this state and found its final resting place within the boundaries of this state. Accordingly, there is no violation of due process or the commerce clause in imposition of Washington B&O tax upon gross proceeds from these pier nose liner sales.

15. Sufficient nexus exists for Washington to impose its B&O tax on the gross proceeds from the three Kamyr contracts at issue in this action notwithstanding the fact that these contracts cover only design, material procurement, and shop fabrication, all of which took place at CBI facilities outside the state of Washington. A taxpayer may not control the tax consequences of its business activity merely by segregating elements of an integrated agreement into separate contracts on an in-state and out-of-state basis in disregard of the continuing nature of the business activity. That personal property was fabricated outside the state of Washington is not determinative of tax consequences when that property is sold to in-state

customers and finds its final resting place within the boundaries of this state.

16. Washington's business and occupation tax is a fundamentally distinct and different tax from the net income taxes imposed by other states of the United States. A state net income tax is imposed only on enterprises showing a net income on overall operation. Washington's B&O tax is imposed on the gross proceeds of specific sales and applies whether or not the interstate enterprise has an overall net income. Washington's B&O tax is not a tax on the overall income stream but rather a tax on the privilege of engaging in specific in-state business activities.

17. The Washington B&O tax being here imposed is upon the activity of making sales in Washington. It applies only to sales consummated within this

state. The tax is not on delivery alone, but upon the marketing activity within the state. Despite the fact that for all sixteen contracts included in this action, all contract procurement activities between CBI and its customers took place outside the state, the state of Washington as the state of destination has the right to deem the sale as having been made within the state and to impose its B&O tax upon the gross proceeds of these sales.

18. Washington's B&O tax and the net income taxes imposed by other states are not susceptible to the same analysis when constitutional standards of fair apportionment are at issue. A state income tax requires that some type of apportionment standard be built into the tax statute itself to segregate local income from that derived from

out-of-state sources. Washington's business and occupation tax is already apportioned in direct relation to the business activities conducted by CBI within the state of Washington because only those sales for which there is supporting nexus are reached by the tax. Washington's B&O tax is properly apportioned exactly to the activities taxed because the proceeds to CBI of sales made to customers in states other than Washington are not included in CBI's taxable Washington gross receipts.

19. CBI has offered some evidence that the activities of its out-of-state operating divisions in design, engineering and manufacturing could be functionally disassociated for apportionment purposes from its in-state installation activities. However, under

the facts of this case, apportionment is not constitutionally required.

20. The Washington B&O tax as measured and assessed on the contracts in this action meets the constitutional requirements of fair apportionment. The recent U.S. Supreme Court cases, Mobil Oil Corp. v. Commissioner of Taxes, 510 U.S. 425, 63 L. Ed.2d 510 (1980) and Exxon Corp. v. Wisconsin Department of Revenue, ____ U.S., 65 L. Ed.2d 66 (1980) concerning apportioned net income taxation of unitary interstate business enterprises, do not undermine this analysis.

21. Imposition of the Washington B&O tax as assessed on CBI in this action does not subject CBI to the risk of multiple tax burdens in violation of the Commerce Clause and RCW 82.04.4286. The tax is imposed upon business activity

within the state. The measure of the tax is the gross proceeds from the sales attributable to that activity. No part of the tax is attributed to activities taking place outside of the state. The fact that other incidents might occur elsewhere rendering CBI liable for different taxes in another state does not mean that constitutionally impermissible burdens are occasioned as a result of the Washington tax because no other state is at liberty to impose a tax on the activity of selling CBI products in the state of Washington.

22. The Washington B&O tax is imposed on specific sales which result from the integrated operations of CBI's interstate business and as such is properly apportioned. Therefore net income tax apportionment analysis is not

applicable to the B&O tax as applied in this case.

23. The Washington B&O tax upon the contracts here involved is not out of all appropriate proportion to the intrastate value of the activities taxed so as to be a violation of the due process laws, the commerce clause, or RCW 82.04.4286.

24. Imposition of the Washington B&O tax upon 100% of CBI's proceeds from the sixteen contracts included in this action does not discriminate against interstate commerce in violation of the commerce clause.

25. Nothing in the facts before this Court supports a conclusion that constitutionally impermissible multiple tax burdens have occurred. Imposition of Washington's B&O tax on the contracts at issue in this action does not discriminate against interstate commerce

by imposing a burden on interstate commerce not borne by intrastate commerce. The tax in question is applicable to all who engage within the state in the business of making sales, whether they be at wholesale or retail. CBI does not suffer any greater tax burden than taxpayers engaged solely in intrastate commerce, who negotiate and execute contracts identical to those of CBI at issue in this case except that all aspects of work on the contracts occur within the state of Washington. The B&O tax is applied equally to all those engaged in the same activity within the state.

26. Imposition of business and occupation tax on the sales of products which are included in the contracts at issue in this action is constitutional under the due process and commerce

clauses of the U.S. Constitution and does not constitute any denial of equal protection of the law. Imposition of business and occupation tax on sales of products whose materials were obtained or fabricated in foreign countries does not impermissibly burden or discriminate against foreign commerce in violation of the U.S. Constitution.

27. CBI has voluntarily dismissed from its Amended Notice of Appeal paragraphs 31 and 32 which constitute Count IV of its action. Accordingly, issues regarding RCW 82.04.260(9) or (10) and the sale or manufacture of nuclear fuel assemblies are not before this Court.

28. Defendant State of Washington is entitled to a judgment of dismissal with prejudice of the complaint and is also entitled to recover its costs and disbursements herein. Plaintiff is not

entitled to terms as a result of the continuance of the trial of this action pursuant to the order of this Court entered November 13, 1979.

DONE IN OPEN COURT this 9th day of September, 1981.

s/FRANK E. BAKER, JUDGE

Presented by:

Kenneth O. Eikenberry
Attorney General
State of Washington

s/ANDREW C. HARVARD
Assistant Attorney General

Attorneys for Defendant

Approved as to form; Notice
of Presentation Waived

LeSourd, Patten, Fleming,
Hartung & Emory

s/RODNEY J. WALDBAUM

s/DANIEL D. WOO

APPENDIX 4

JUGDMENT OF SUPERIOR COURT
OF WASHINGTON FOR THURSTON COUNTY

FILED IN CLERKS OFFICE, SUPERIOR COURT, STATE OF WASHINGTON, SEPTEMBER 9, 1981.

SUPERIOR COURT, STATE OF WASHINGTON
COUNTY OF THURSTON

CHICAGO BRIDGE & IRON COMPANY,	)	NO. 55347
Plaintiff,	)	JUDGMENT
v.	)	
STATE OF WASHINGTON,	)	
Defendant.	)	

THIS MATTER having come on regularly for hearing on January 13, 1981, before the Honorable Frank E. Baker, Judge of the above-entitled Court, sitting without a jury, plaintiff being represented by its attorneys, LeSourd, Patten, Fleming, Hartung & Emory, Rodney J. Waldbaum and Daniel D. Woo, and its assistant

corporate counsel, Kent J. Schielke, defendant being represented by Kenneth O. Eikenberry, Attorney General and Andrew C. Harvard, Assistant Attorneys General, and the Court having heretofore entered a written Memorandum Opinion and written Findings of Fact and Conclusions of Law, and the Court being fully advised, now, therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint is hereby dismissed with prejudice and the defendant is awarded its costs and disbursements herein incurred.

DONE IN OPEN COURT this 9th day of September, 1981.

s/FRANK E. BAKER, JUDGE

Presented by:

Kenneth O. Eikenberry
Attorney General
State of Washington

s/ANDREW C. HARVARD
Assistant Attorney General

Attorneys for Defendant

Approved as to form; Notice
of Presentation Waived

LeSourd, Patten, Fleming,
Hartung & Emory

s/RODNEY J. WALDBAUM

s/DANIEL D. WOO

APPENDIX 5

UNITED STATES CONSTITUTION
Section 8, Clause 1.

Powers of Congress; levy of taxes for common defense and general welfare; uniformity of taxation.

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

UNITED STATES CONSTITUTION
Amendment XIV.

Citizenship; privileges and immunities; due process; equal protection; apportionment of representation; disqualification of officers; public debt; enforcement.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

REVISED CODE OF WASHINGTON

82.04.050 "Sale at retail", "retail sale". "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, or (b) installs, repairs, cleans, alters, imprints, improves, constructs or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new

article being produced for sale, or (d) purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.16.010. The term shall include every sale of tangible personal property which is used or consumed or to be used or consumed in the performance of any activity classified as a "sale at retail" or "retail sale" even though such property is resold or utilized as provided in (a), (b), (c), or (d) above following such use. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280, subsections (2) and (7) and RCW 82.04.290.

The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto, but excluding charges made for the use of coin operated laundry facilities when such facilities are situated in an apartment house, hotel, motel, rooming house, trailer camp or tourist camp for the exclusive use of the tenants thereof, and also excluding sales of laundry service to members by nonprofit associations composed exclusively of nonprofit hospitals, and excluding services rendered in respect to

live animals, birds and insects; (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture; (c) the sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; and for purposes of this section the term "janitorial services" shall mean those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting; (d) the sale of or charge made for labor and services rendered in respect to automobile towing and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16 RCW; (e) the sale of and charge made for

the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same; (f) the sale of or charge made for tangible personal property, labor and services to persons taxable under (a), (b), (c), (d) and (e) above when such sales or charges are for property, labor and services which are used or consumed in whole or in part by such persons in the performance of any activity defined as a "sale at retail" or "retail sale" even though such property, labor and services may be resold after such use or consumption. Nothing contained in this paragraph shall be construed to modify the first paragraph of this section and nothing contained in the first paragraph of this section shall be construed to modify this paragraph.

The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal business or professional services, including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities; (a) amusement and recreation businesses including but not limited to

golf, pool, billiards, skating, bowling, ski lifts and tows and others; (b) abstract, title insurance and escrow business; (c) credit bureau business; (d) automobile parking and storage garage businesses.

The term shall also include the renting or leasing of tangible personal property to consumers.

The term shall also include the providing of competitive telephone services as defined in RCW 82.16.010.

The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind, nor shall it include sales of feed, seed, fertilizer, and spray materials to persons for the purpose of producing for sale any agricultural product whatsoever, including milk, eggs, wool, fur, meat, honey, or other substances obtained from animals, birds, or insects but only when such production and subsequent sale are exempt from tax under RCW 82.04.330, nor shall it include sales of chemical sprays or washes to persons for the purpose of

post-harvest treatment of fruit for the prevention of scald, fungus, mold, or decay.

The term shall not include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing, or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation. Nor shall the term include the sale of services or charges made for the clearing of land and the moving of earth of or for the United States, any instrumentality thereof, or a county or city housing authority.

REVISED CODE OF WASHINGTON

82.04.240 Tax on manufacturers. Upon every person except persons taxable under subsections (2), (3), (4), (5), (7), (8), or (9) of RCW 82.04.260 engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of forty-four one-hundredths of one percent.

The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

REVISED CODE OF WASHINGTON

82.04.250 Tax on retailers. Upon every person except persons taxable under RCW 82.04.260(8) engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent.

REVISED CODE OF WASHINGTON

82.04.270 Tax on wholesalers, distributors. (1) Upon every person except persons taxable under subsections (1) or (8) of RCW 82.04.260 engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent.

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of

distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: Provided, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying forty-four one-hundredths of one percent of the value of the article so distributed as of the time of such distribution: Provided, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purposes of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sale at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: Provided, further, That delivery trucks or vans will not

under the purposes of this section be considered to be retail stores or outlets.

REVISED CODE OF WASHINGTON

82.04.440 Persons taxable on multiple activities. Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: Provided, That persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240 or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold, and that persons taxable under RCW 82.04.240 or RCW 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

WASHINGTON ADMINISTRATIVE CODE

WAC 458-20-137 (Rule 137) Articles manufactured and installed. Persons engaged in the business of manufacturing in this state boilers, cabinets and mill work, cement blocks and pipes, conduits, heating equipment, lighting fixtures, sheet metal articles, venetian blinds, window drapes and shades, or other articles, and who also install such

articles after manufacture, are taxable as follows:

BUSINESS AND OCCUPATION TAX

Taxable under the Retailing classification in respect to the total charge for selling and installing when for consumers.

Taxable under the Wholesaling classification in respect to the total charge for selling and installing when for persons other than customers.

Persons who manufacture articles in this state and install the same for customers in other states are taxable under the Manufacturing classification on the value (at the place of manufacture) of the article so installed.

Persons who manufacture articles outside this state and install the same for consumers in this state are taxable under the Retailing classification upon the total charge made therefor, irrespective of whether or not a segregation is made between the charge for the article manufactured and the charge for installing the same.

RETAIL SALES TAX

The retail sales tax applies upon both the sale and installation of such articles when made to or for consumers.

It is immaterial whether such articles remain personal property after installation or whether the same become a part of real property. In either event, the retail sales tax applies.

Revised August 1, 1950.

WAC 458-20-194 (Rule 194) Doing business within and without the state. Persons domiciled outside this state who (1) sell or lease personal property to buyers or lessees in this state, or (2) perform construction or installation contracts in this state, or (3) render services to others herein, are doing business in this state, irrespective of the domicile of such persons and irrespective of whether or not such persons maintain a permanent place of business in this state.

Persons domiciled in and having a place of business in the state, who (1) sell or lease personal property to buyers or lessees outside this state, or (2) perform construction or installation contracts outside this state, or (3) render services to others outside this state, are doing business both within and without this state. Whether or not such persons are subject to business tax under the law depends upon the kind of business and the manner in which it is transacted. The following general principles govern in determining tax liability or tax immunity.

BUSINESS AND OCCUPATION TAX

When the business involves a transaction in or related to interstate or foreign commerce, see WAC 458-20-193.

When the business involves a construction or installation contract in this state, no deduction from the measure of the tax is permitted, even though the contractor is domiciled outside this state and maintains a place of business outside this state which may contribute to the contract performed in this state. See WAC 458-20-137, 458-20-170, 458-20-171, and 458-20-172.

When the business involves a construction or installation contract outside this state, the tax does not apply to any part of the income derived therefrom (except such part of the income as may be applicable to the manufacture in this state by the contractor of articles used or incorporated in such construction or installation), even though the contract is domiciled in this state and maintains a place of business herein which may contribute to the contract performed outside this state. See WAC 458-20-136.

When the business involves a transaction taxable under the classification Service and Other Business Activities, the tax does not apply upon any part of the gross income received for services incidentally rendered to persons in this state by a person who does not

maintain a place of business in this state and who is not domiciled herein. However, the tax applies upon the income received for services incidentally rendered to persons outside this state by a person domiciled herein who does not maintain a place of business within the jurisdiction of the place of domicile of the person to whom the service is rendered.

For example, persons domiciled herein, but having no place of business outside this state, are taxable upon the following types of income:

1. An insurance agency upon commissions received for insurance placed without the state.

2. An attorney upon fees received from persons without the state, even though a portion of his services were necessarily performed without the state.

3. A collection agency upon income received from clients without the state or with respect to collections made from persons without the state.

4. An accountant upon income received from persons for services performed without the state.

5. A financial business upon income received from loans placed without the state.

6. A commodity broker upon commissions received from persons without the state.

7. An advertising agency upon income received from advertising solicited and secured from firms without the state.

8. An employment agency upon income received for securing employees for firms without the state.

9. A physician upon income received from the treatment of patients without the state.

10. A purchasing agency upon commissions received from clients without the state or with respect to purchases made without the state.

Persons engaged in a business taxable under the Service and Other Business Activities classification and who maintain places of business both within and without this state which contribute to the performance of a service, shall apportion to this state that portion of gross income derived from services rendered by them in this state. Where it is not practical to determine such apportionment by separate accounting methods, the taxpayer shall apportion to this state that proportion of total income which the cost of doing business within this state bears to the total cost of doing business both within and without this state.

PUBLIC UTILITY TAX

Persons engaged in a public service business in this state are not taxable with respect to gross income derived from conducting business outside this state, nor in respect to conducting business in interstate or foreign commerce.

Revised June 1, 1970.

EXCISE TAX BULLETIN NO. 399.04.137.

Business and Occupation--Out-of-State Installation Services--Charges--Charges by a local manufacturer for out-of-state installation services on articles sold are not subject to the business and occupation tax. However, the business and occupation tax under the Manufacturing classification is assessed upon the value, at the place of manufacture, of the articles installed out-of-state. The state does not tax any additional values resulting from charges made from out-of-state services.

APPENDIX 6

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1. The subject matter of this stipulation is a statement of the jurisdictional facts followed first by a summary and description of the operations and accounting procedures of Chicago Bridge & Iron Company, and then followed by a description of each of the specific transactions which are the subject of this tax refund action. This stipulation was developed pursuant to an order of Judge Frank E. Baker, entered on November 13, 1979, at a hearing on the defendant State of Washington's (hereinafter State) motion to continue the date of trial. At the time of the hearing, Judge Baker did

not rule upon either the scope or the substance of any of the potential testimony or other evidence to be adduced at trial. The intent of the order was to reduce the estimated length of trial by obviating plaintiff Chicago Bridge & Iron Company's (hereinafter CBI) need to offer lengthy testimony, to allow the parties to organize the exhibits offered by CBI, and to permit the State additional time to evaluate additional claims contained in the plaintiff's Amended Notice of Appeal. The State in agreeing to the matters contained herein concedes only their factual accuracy and admissibility. Both parties specifically reserve the right to argue before the Court the materiality or relevance to any issue of any of the stipulated facts, attachments, materials, documents or

exhibits referred to herein. IT IS HEREBY STIPULATED AND AGREED by the parties to this cause, through their respective attorneys, for the purpose only of the trial hereof and any appeals taken herefrom, that the following facts are admitted and agreed by the parties to be true and accurate, and the documents referred to herein as Exhibits numbered 1 through 93, inclusive, submitted herewith and made a part hereof, are stipulated as Exhibits which may be deemed admitted into evidence at said trial, and that said Exhibits are business records which set forth facts which are true and may be considered by the Court as true in the trial of this action without necessity for further authentication. Neither party will offer any evidence upon the trial of this cause in addition to what

has been stipulated herein, except upon the issue of whether the tax rate of RCW 82.04.260(9) or RCW 82.04.260(10) is applicable to CBI Contract No. 70-7077 and except as to any facts of which the Court may take judicial note and except in response to any inquiries from the Court.

5. Within the time provided by, and pursuant to the provisions of RCW 82.32.180 and RCW 82.32.060, plaintiff CBI filed this action against the defendant State of Washington.

6. The two audit periods involved in this action together extended from January 1, 1967 through March 31, 1975, which period will hereafter be referred to as "the audit period". During the audit period, CBI assigned a total of 149 contract numbers for 183 products

designed, engineered and manufactured at CBI facilities outside the State of Washington and installed or delivered within Washington for 52 different customers. "Contract numbers" are a part of a CBI internal identification system in which CBI assigned one or more CBI contract numbers to the products or work covered by each of CBI's contracts with its customers. During the audit period, CBI's practice was to report and pay B&O taxes upon any contracts which were directly procured by CBI's sales office in the State of Washington. Conversely, CBI's practice was to neither report nor pay B&O taxes upon any contracts relating to products installed or delivered within Washington but which were directly procured by CBI's sales offices located outside of the State of Washington and

which did not directly involve CBI's Washington sales office. The Department assessed B&O taxes upon 35 contracts relating to products which were installed or delivered within Washington, but which CBI had not reported for B&O tax purposes because CBI's Washington sales office was not directly involved in their procurement. Of these 35 contracts assessed, CBI has paid pursuant to the assessment without protest B&O taxes upon those contracts for which CBI's Washington sales office was indirectly involved in the procurement or negotiation thereof or upon contracts which were in essence contracts for the repair of products located in the State of Washington. In this action, CBI protests the assessment by the Department of B&O taxes on 16 out of the 35 separate

contracts for which B&O taxes were assessed against CBI by the Department in tax assessment Nos. 67928 and 86328. The 16 contracts protested by CBI were among the 149 contracts for 183 products designed, engineered and manufactured outside Washington and installed or delivered in Washington during the audit period. Appended to this stipulation is a chart (Attachment A) identifying for the convenience of the court the CBI contract numbers, the customers and the places of installation involved in the various paragraphs of plaintiff's Amended Notice of Appeal. Also appended to this stipulation is a chart (Attachment B) showing the amounts of tax and interest for which CBI seeks a refund on the contracts included in this action. The factual statements contained in this and

the following paragraphs of this stipulation pertain to the aforesaid audit period unless otherwise stated.

18. The Seattle Sales Office was responsible for customers whose purchasing offices were located in Alaska, Washington, Oregon, Idaho, and Montana and which contracted with CBI through those offices. The Seattle Sales Office was not involved in any aspect of any of the contracts included in this action. The Seattle Sales Office, however, pursuant to a general CBI practice, was often informed as a matter of courtesy by other CBI district sales offices about contracts obtained by those other CBI offices, which contracts involved installation work within the customer territory of the Seattle Sales Office. The Seattle Sales Office usually

received this information through informational copies of contract documents or correspondence. CBI has not contested the imposition of B&O tax on contracts for which installation took place within the state of Washington when the Seattle Sales Office participated in the procurement of such contracts.

24. The Operations Division, headed by the Manager of Operations, who was located in Oak Brook, Illinois, was responsible for the manufacture and installation of CBI's products. The Operations Division's administrative departments were located in Oak Brook, Illinois. Reporting directly to the Manager of Operations, the Manager of Plants (also located in Oak Brook, Illinois) had responsibility for the various manufacturing facilities

maintained by CBI throughout the United States for the manufacture of its products. CBI's United States manufacturing plants were located in Fontana, California; Salt Lake City, Utah; Chicago, Illinois (moved in 1973 to Kankakee, Illinois); Houston, Texas; Birmingham, Alabama; Greenville, Pennsylvania; New Castle, Delaware; Memphis, Tennessee; and Conway, Arkansas. The Conway, Arkansas, plant was called by CBI the "ClampCon Division", which specialized in the manufacture of component refrigeration or cryogenic parts for use in systems work. The Memphis, Tennessee, plant primarily manufactured nuclear components. Through its wholly owned subsidiary Horton, CBI also had manufacturing plants located in Vancouver, British Columbia, Canada, and

Fort Erie, Ontario, Canada. Item 13 of Attachments 1 through 16 identifies the locations of the CBI manufacturing plants assigned to the contracts included in this action. CBI had no facilities located in the state of Washington for the manufacture of products for CBI's customers. As to one of the contracts included in this action, however, CBI did subcontract from an unrelated third party in Washington shop painting and priming services which were performed in Washington, rather than in a CBI manufacturing plant. (See paragraph 186 of this Stipulation.)

28. The Western Area Operations Department was responsible for installation work in the Far East, Southeast Asia, Australia, and the western part of the United States. (Ex.

86.) The western part of the United States was called by CBI the Western District, which included the states of California, Utah, Oregon, Washington, Alaska, Hawaii, Idaho, Montana, Nevada, Arizona, Colorado, Wyoming, and part of New Mexico. During the audit period, the Western Area Operations Department headquarters office and the Salt Lake Construction Office, which reported to it, were first located in Salt Lake City, Utah. In September, 1968, both offices moved to Fremont, California. Hereinafter, any statements about the Fremont Construction Office are also applicable to the Salt Lake Construction Office in the period prior to September, 1968. Where the contracts included in this action provided for installation work in the state of Washington, the

installation supervision and administration were performed by either the Salt Lake or Fremont Construction Offices, as indicated by Item 14 of Attachments 1 through 16. Of the 16 contracts included in this action, 12 actually provided for installation work, while 3 (CBI Contract Nos. 73-6679, 73-6680, 73-6681) did not; the remaining one (CBI Contract Nos. 74-2273, 74-2274 and 74-2660) provided for some subassembly work to be done in Washington. All however involved products delivered to locations in Washington.

29. The Fremont Construction Office had warehouse facilities to serve installation sites in the Western District. The warehouses, all owned by CBI, were located in Fontana, California;

Salt Lake City, Utah; Fremont, California (since the end of 1968); and Tacoma, Washington (since 1969). The warehouses were central facilities for storage and routine maintenance of construction equipment used for installation. The warehouse managers reported to the Western District Construction Manager of the Fremont Construction Office in Fremont, California.

30. The Tacoma Warehouse handled 5-10% of the equipment storage and maintenance in Western Area Operations. In comparison to the Fremont Warehouse, the Tacoma Warehouse employed up to 4 persons, one of whom was part-time, while the Fremont Warehouse employed up to 25 people at any one time. The Tacoma Warehouse contained about 5 acres of storage and maintenance space, while the

Fremont Warehouse had about 25 acres. The Fremont Warehouse also handled up to 10 times the amount of equipment as the Tacoma Warehouse.

31. The main construction warehouse was located in Fremont, California. That facility coordinated CBI's needs for equipment stored in the four warehouses in the Western District. CBI owned and had collectively on hand at its various Western District warehouses most of the equipment that was necessary for installation of its products in the Western District. The Fremont Construction Office determined from which warehouse specific equipment would be sent to an installation site based primarily upon the availability of the equipment and proximity of a warehouse to the installation site. Installation

equipment would be shipped from any of the Western District warehouses, including the one in Tacoma, Washington, to an installation site in any of the states in the Western District.

40. Each CBI contracting engineer (see paragraph 11 of this Stipulation) worked with the customers whose purchasing offices were located in the geographic territory for which his district sales office had responsibility. The primary function of the contracting engineer was to procure new contracts for CBI. The contracting engineer kept aware of the market through two primary sources: trade journals and customers. The contracting engineer reviewed trade journals for announcements of upcoming projects on which CBI might wish to bid either as a prime contractor

or subcontractor. In many instances, the contracting engineer could predict which potential customer would be bidding as a prime contractor on a newly announced project. Where such a potential customer had its purchasing office in the territory of the contracting engineer, the contracting engineer would contact the customer's representative to ascertain the possibility of CBI's obtaining business as a subcontractor. In most cases, however, the contracting engineer became aware of potential new business not through trade journals, but through inquiries or discussions with current and former CBI customers or prospective new customers.

41. No matter how the contracting engineer first became aware of potential new business for CBI, the first formal

step taken by CBI to negotiate a new contract would be to respond to a formal invitation to bid submitted to CBI by the potential customer. The contracting engineer was the initial contact between CBI and a potential customer. Each contracting engineer was a college graduate with a degree in engineering. Prior to becoming a contracting engineer, each engineer went through at least a three-year training period in which he worked in every phase of CBI's activities, ranging from design work to manufacturing work to installation work.

43. When invited to bid on something to be installed in the state of Washington, the contracting engineer contacted the Western Area Schedule Coordinator in the Western Area Operations Office in Fremont,

California. The Western Area Schedule Coordinator was also called the Fremont Construction Schedule Coordinator. The contracting engineer described to the area schedule coordinator each proposed product in terms of its function, along with general specifications to the extent known, and the estimated date for completion. The contracting engineer then requested that the area schedule coordinator make a preliminary schedule for completion of all phases of the proposed work. The Operations Division's administrative offices located in Oak Brook, Illinois, would assign the manufacturing plant(s) and the engineering and design office(s) for the potential project. Pursuant to CBI's policy and practice, CBI's customers did not participate in CBI's decision to

assign portions of the work for a given product to particular CBI offices, plants or divisions. The assignment of work reflected CBI's internal policies and requirements. With the potential customer's proposed deadline for the delivery and/or installation of each product in mind, the area schedule coordinator determined a feasible schedule for the design, purchase of materials, manufacture and/or installation of the proposed product(s) by the assigned departments. Neither the contracting engineer nor the area schedule coordinator was responsible for selecting the manufacturing plant(s) and engineering office(s) for the project.

44. Once the contracting engineer received the requested information from the area schedule coordinator, he

prepared an estimate of the contract costs and then submitted a bid proposal, including contract price and schedule, to the customer. Several factors affected the estimate of the contract price. These included the preliminary schedule, the locations of the district engineering office(s), manufacturing plant(s) and installation site, and the pertinent labor rates. The contracting engineer was assisted in the estimating process by constantly updated manuals, called "Estimating Guides", prepared by CBI's General Sales Department in Oak Brook, Illinois. The Estimating Guides provided base prices for material costs as well as labor rates for fabrication and installation, including the overhead, fringe and administrative percentages associated with the labor hours at the

assigned facilities. Once the contracting engineer had determined his broken-down cost figures, he selected a percentage multiplier to be applied to the total cost estimate to establish the "margin" or potential profit. The contracting engineer's worksheets containing the cost breakdowns and margin figures were called CBI Contract Estimate and Analysis Sheets (hereinafter "CE&A Sheets"). The estimated broken-down costs contained in the CE&A Sheets were determined as accurately as possible at the time of estimating. (See paragraphs 156-161 of this Stipulation.)

45. CBI preferred "lump-sum" contracts as opposed to "cost-plus" contracts. In a lump-sum contract, a definite fixed total price was agreed between the parties to be the

consideration for the contract. In a cost-plus contract, the parties agreed that the consideration would be the reimbursement of CBI's costs plus an agreed margin. Once the estimating process was completed, the contracting engineer proposed a lump sum, if possible, to the customer for the products contemplated. See Item 8 of Attachments 1 through 16 for the originally agreed-upon fixed prices in the contracts included in this action. When a bid was made by a contracting engineer to a customer's representative located outside the geographic area in which the product was to be delivered or installed, a courtesy copy of the proposal was usually sent by the contracting engineer responsible for the contract to the district sales office in

whose geographic customer territory the product would be delivered or installed. (See paragraph 18 of this Stipulation.)

46. CBI's policy was to try to obtain an entire job, which would normally include design, engineering, procurement of materials, manufacturing and installation. When CBI tried to subcontract with a customer who had responsibility for only a portion of a job, CBI's policy was to try to obtain responsibility for that customer's entire portion. CBI's policy was to maintain control over whichever aspects of any job it undertook.

47. It was in furtherance of the policy described above in paragraph 46 of this Stipulation that CBI had the policy of negotiating all jobs in terms of a lump-sum price for all aspects of the

work. Normally, CBI did not contract for any single aspect (that is, design, engineering, procurement of materials, manufacturing, installation or delivery) without contracting for all aspects of a job. Normally, a single contract arose from a single course of negotiation. In certain circumstances, multiple written contracts arose from a single course of negotiations, either because a single customer required bifurcation of the contract or because more than one customer had responsibility for different aspects of the total job, or both. See paragraphs 170, 173, and 224-225 of this Stipulation. In all but one (see paragraphs 224-236 of this Stipulation) of the contracts included in this action, CBI negotiated and ultimately performed all aspects of design, engineering,

procurement of material, manufacturing and installation related to the products involved, even though in some cases separate contracts for different aspects of the work had been executed.

50. For all the contracts included in this action, all contract procurement activities between CBI and its customers took place outside the State of Washington. See Item 7 of Attachments 1 through 16.

68. All of the design and engineering work required for the contracts in this action was performed in the assigned CBI district engineering offices located outside the state of Washington or in design offices in Oak Brook, Illinois, where the basic design work was done.

88. For all but one of the contracts included in this action (in which some manufacturing work was performed by an unrelated third-party subcontractor of CBI, see paragraph 186 of this Stipulation), all of the manufacturing activities were performed by the assigned CBI manufacturing plants outside the state of Washington.

89. When CBI had responsibility for the installation of its products, that responsibility was assigned to the construction office in whose geographic territory the installation would be done. Installation of CBI products which were delivered into the state of Washington and for which CBI had installation responsibilities was assigned to the Salt Lake or Fremont

Construction Offices. (See paragraph 28 of this Stipulation.)

92. Each project manager (sometimes called by CBI a project coordinator) in the Fremont Construction Office had the responsibility to coordinate and oversee only one project at a time. A full-time project manager was assigned to work on a particular project because of the project's complexity or high-dollar value. The project manager had the responsibility for coordinating all of the installation work on the project to meet the required completion dates safely and economically. In order to meet the area schedule coordinator's deadlines, part of the project manager's responsibility included preparation of what CBI called "critical path method" schedules or "CPM's", which were

basically bar graphs or charts showing the installation work schedule. The project manager also had the responsibility for cost control, including advising the contracting engineer who procured the contract on how actual costs were running compared to estimates. This responsibility included notifying the responsible contracting engineer of problems affecting the contract price or future cost estimates, evaluating for the contracting engineer the effects of customer changes on contract costs, and maintaining customer liasons through the contracting engineer. The project manager was also responsible for ensuring that CBI correctly performed the installation work. The project manager's office was located in Fremont, California. The

project manager reported to the manager of the Fremont Construction Office. Because of his responsibilities, the project manager periodically visited the installation job site. See paragraphs 182-187, 197-211, and 224-236 of this Stipulation for those contracts related to this action to which were assigned project managers.

93. For smaller projects which did not warrant the assignment of a project manager, the responsibility for installation work was given to a construction supervisor (also called a contract supervisor after the audit period). Each construction supervisor was responsible for handling several installation projects simultaneously. His primary responsibility was to ensure that the tools, men, equipment and site

facilities necessary for installation be available for each job assigned to him. In other words, he was responsible, and planned the organization, for the installation work. He had the responsibility for setting up a cost control system for each job. He also had the responsibility for seeing that the installation schedules set by the area schedule coordinator were met, and in the event of installation delays and field changes affecting contract costs, the construction supervisor had the responsibility of advising the area schedule coordinator of these changes. The construction supervisors in the Fremont Construction Office were based in Fremont, California, and visited the installation sites as their responsibilities required. (See, for

example, paragraph 94 of this Stipulation.)

97. CBI employed a group of trained installation supervisors who were temporarily assigned to installation sites for the duration of the CBI product installation as on-site personnel. Assignments were made as needed by CBI. Supervisory personnel were selected on the basis of availability, experience and ability. They were permanent full-time CBI employees who reported to the construction office and construction supervisor having responsibility for the given installation. They included field foremen, pushers, welding supervisors, and field engineers. Such personnel assigned to installation sites in the state of Washington reported to CBI's Salt Lake or Fremont Construction

Offices. For each contract, the construction supervisor was assisted by an on-site field foreman assigned to the installation site. The field foreman was specially trained and experienced in the installation of CBI products. Pushers were assistant foremen. Welding supervisors had responsibility to inspect and maintain the quality of welding done at the installation sites. (See paragraph 106 of this Stipulation.) Field engineers were CBI engineers who underwent a CBI training program in which they worked as field laborers at installation sites and also did paper work on-site, including compilation of payroll records and expense accounts. Field engineers also performed on-site engineering duties including the preparation of "as-built" drawings and

engineering orientations. "As-built" drawings or orientations were records of the actual installation (as distinct from design drawings and orientations). The field foremen, pushers, welding supervisors and field engineers traveled throughout the United States to various installation sites as assigned and remained on the sites as required throughout the installation process. They were not permanently assigned to CBI activities in the state of Washington.

98. The remainder of the field crew at the installation site consisted of nonsupervisory personnel, primarily boilermakers, operating engineers, and oilers. Boilermakers were welders. Operating engineers and oilers operated construction equipment. Because of CBI's union contracts, CBI was required to make

up the field crews with union members hired by the foremen through the local hiring halls in the state where the installation work was done. Field crew members were hired temporarily for a specific project only and did not constitute permanent employees of CBI. Appended to this Stipulation is a chart (Attachment C) showing the total number of CBI employees within the State of Washington and total wages paid those employees as reported by CBI to the Washington State Department of Employment Security during the audit period. This chart (Attachment C) is not limited to employees and wages paid with respect to the 16 contracts involved in this litigation.

120. Engineering (Cost Category Nos. 100, 110, 130, 140, and 150):

a. All costs accounted for in cost categories Nos. 100 through 150 were for activities of CBI's Engineering and Research Division in performing the contracts for which the Contract Cost Reports and Summaries were prepared. These activities took place at CBI's Engineering and Research Division facilities located outside the state of Washington for the contracts included in this action. (See paragraph 68 of this Stipulation.) These cost categories accounted for Engineering and Research Division labor and overhead costs. Cost category No. 100 is the sum of the total costs accounted for in cost category Nos. 110 through 150.

b. Cost category No. 110 accounted for Contract Engineering labor and overhead costs, which included all the labor and overhead costs incurred by the district engineering offices located in Birmingham, Alabama, Greenville, Pennsylvania, Houston, Texas, New Castle, Delaware, and Salt Lake City, Utah.

c. Cost category No. 130 accounted for Oak Brook Engineering labor and overhead costs which were incurred by various engineering departments located in Oak Brook, Illinois, including Oak Brook Engineering-Administrative, Oak Brook Development Engineering and Technical Consulting, Oak Brook Stress Analysis, Oak Brook Metals Engineering; Oak Brook Engineering Services, and the departments in Oak Brook Contract Design, comprising Oak Brook Marine Structures

Design, Oak Brook Special Structures Design, Oak Brook Standard Structures Design, Oak Brook Systems Design, and Oak Brook Foundations and Miscellaneous Structural Design.

d. Cost category No. 140 accounted for Research Engineering labor and overhead costs, including those incurred by CBI's research facilities in Plainfield, Illinois.

e. Cost category No. 150 accounted for "other" engineering and research costs, including all expenses applicable to engineering, which were incurred by research or engineering personnel, and vendors' invoices, which showed the amounts incurred by CBI for engineering or research-related work by non-related third parties.

162. From the same information used in the preparation of the CBI Contract Cost Reports and Contract Cost Summaries (see paragraphs 112 and 113 of this Stipulation), CBI's Tax Department, located at CBI's corporate headquarters in Oak Brook, Illinois, computed at least annually the taxes owed by CBI to the various states in which CBI did business. CBI engaged in business throughout the nation. During the audit period, among the states to which CBI paid taxes based upon net income were the following states in which work was done by CBI for one or more contracts included in this action: Alabama, Arkansas, Delaware, Illinois, Pennsylvania, Utah and California (Exs. 19-78). Each of these states used a statutory apportionment formula to determine the

portion of CBI's corporate income which was subject to its tax.

163. Although the statutory scheme varied from state to state, common to all of the schemes for taxation of corporate net income was a three-factor apportionment formula. Using such a formula, a state can determine the portion of a corporation's net income which it may tax by applying an apportionment ratio to the corporation's total corporate net income. The apportionment ratio is determined by averaging the ratio of corporate real and personal property located in or attributable to the taxing state to total corporate real and personal property, the ratio of corporate payroll in the taxing state to total corporate payrolls, and the ratio of corporate sales in or

attributable to the taxing state to the total corporate sales. The apportionment ratio is applied to the total corporate net income to determine the "apportioned net income tax base". CBI's total corporate net income is based on income from all sources, including the contracts included in this action. The apportioned net income tax base is then multiplied by the state's applicable statutory corporate net income tax rate to determine the corporation's tax liability to the taxing state. In calculating its tax liability to each of the states enumerated in paragraph 162 of this Stipulation, CBI included in the numerator of the apportionment ratio the payrolls incurred in the taxing state for one or more contracts included in this action, along with the payrolls incurred

for all other work done in the taxing state.

170. CBI Contract Nos. 73-6679, 73-6680, and 73-6681 were the respective internal CBI designations for three contracts executed between CBI, through its sales office in New York City, and Kamyr Incorporated (hereinafter Kamyr Inc.), through the latter's principal office in Glens Falls, New York. These contracts were for the design, procurement of material, and shop fabrication of respectively a continuous digestor, a soda-oxygen digestor (or reactor), and a blow tank for resale by Kamyr Inc., to the Weyerhaeuser Paper Company (hereinafter Weyerhaeuser). From the same negotiations which resulted in these contracts, three corresponding contracts were executed for installation

of the products covered by CBI Contract Nos. 73-6679, 73-6680 and 73-6681 at Weyerhaeuser's Everett, Washington, facility. (Ex. 1.101.) These three installation contracts, internally designated by CBI as CBI Contract Nos. 73-7291, 73-7292, and 73-7293, were executed by CBI and Kamyr Inc.'s sister corporation Kamyr Installations, Inc., in New York. Taken together, each set of corresponding contracts cover the design, procurement of materials, fabrication and installation by CBI of a single product. The administration and performance of the design, material and fabrication contracts were internally integrated with the administration and performance of the installation contracts following standard CBI operations as described in paragraphs 40-107 of this Stipulation. Internal CBI

business records reflect this integration. All three Kamyr Inc. purchase orders stated the following as to payment terms:

> "Total amount less 10% retainage due and payable upon presentation of shipping documents indicating freight prepaid.
>
> "Retainage due and payable upon test and acceptance or within 30 days from completion of erection, whichever occurs sooner." (Exs. 1.201, 2.201 and 3.201.)

APPENDIX 7

FILED May 11, 1983.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHICAGO BRIDGE & IRON COMPANY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Appellee.	NO. 48133-4

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Chicago Bridge & Iron Company, the appellant above named, hereby appeals to the

Supreme Court of the United States from the judgment entered against it by this Court on February 17, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: May 10, 1983.

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FILED
JUL 15 1983
ALEXANDER L. STEVAS

No. 82-1848

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1982

CHICAGO BRIDGE & IRON COMPANY,
Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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Wash. Rev. Code § 82.04.060 3

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OTHER AUTHORITIES

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H.R. 6402, 97th Cong., 2d Sess. § 603 (1982) ..... 16n.

H.R. 6402, 97th Cong., 2d Sess. § 605 (1982) ..... 16n.

H.R. 6402, 97th Cong., 2d Sess. § 611 (1982) ..... 16n.

H.R. 6402, 97th Cong., 2d Sess. § 622 (1982) ..... 11n.

H.R. 6402, 97th Cong., 2d Sess. § 623(3) (1982) ..... 16n.

H.R. 11798, 89th Cong., 1st Sess. (1965) 15

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S. 317, 92d Cong., 1st Sess. (1971) 15

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S. 1245, 93d Cong., 1st Sess. (1973) 15

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No. 82-1848

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MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Appellee State of Washington, Department of Revenue, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington State Supreme Court on the ground that it is manifest that the questions presented are so unsubstantial as to need no further argument.

I.

STATEMENT

This appeal involves the validity of the Washington business and occupation tax (Wash. Rev. Code Ch. 82.04) as applied to certain business activities of the Appellant,

Chicago Bridge and Iron Co. ("CBI"), in the State of Washington. After describing these activities, we then describe Washington's business and occupation tax, as applied to these activities, and the nature of CBI's claim that this tax has been applied unconstitutionally.

A. CBI's Washington Activities.

CBI constructs and sells large steel structures throughout the world.[1] Illustrative of the types of steel structures built in Washington and involved in this dispute are the following: a nuclear containment vessel to house a nuclear reactor (Stip. Par. 197); a steel silo for the storage of aluminum 98 feet in diameter and 77 feet in height, (Stip. Par. 192, 193); and 42 oil storage tanks ranging in height from 40 to 51 feet and ranging in diameter from 60 to 200 feet (Stip. Par. 182, 183). The contracts between CBI and its customers cover the entire job from start to finish. Thus, the particular contracts involved in this litigation included the designing and engineering of the structure, the fabrication of the components — all of which took place outside of Washington — and its actual construction by CBI, which took place within Washington. CBI alleges that the value added by this in-state construction activity accounted for

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[1]In describing its Washington activities in its Jurisdictional Statement, CBI prefers the term "installation" to the term "construction." For example, the Question Presented refers to CBI's Washington activities under the contracts in dispute as involving "only installation." While the stipulation of facts does use this term, it does so in a rather Pickwickian sense, as the stipulation itself makes clear. As stated in Par. 8:

> "CBI has been engaged in the design, engineering, manufacture, and installation (including field painting and/or field testing when required by a contract) of large, all-welded steel-plate custom products, such as ground storage tanks, elevated tanks, spheres, silos, process tanks, nuclear containment vessels, hydro-electric generator components, and other items. CBI has used the term 'structures' for many types of its products. CBI has used the terms 'construction', 'installation', or 'erection' to describe the activities embodying the assembly and welding together of fabricated steel subassemblies into the whole product at a customer's installation site. The term 'installation' is used in this Stipulation in this sense."

30 to 40 percent of the total contract price in each case. J.S. 11.

B. Washington's Tax as Applied to CBI's Business

Washington's business and occupation tax is imposed "for the act or privilege of engaging in business activities." (Wash. Rev. Code § 82.04.220) The specific categories of the tax involved in this case are the retailing and wholesaling categories, which are imposed upon "every person * * * engaging within this state in the business of making sales" at either retail or wholesale. (Wash. Rev. Code § § 82.04.250 (retailing) and .270 (wholesaling); J.S. A-122) The tax is the same as that involved in *General Motors v. Washington*, 377 U.S. 436 (1964) and *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975).[2]

As seen from these two decision, the tax is a gross receipts tax, not a value-added tax or a net income tax. That is, it is measured by the total gross receipts received from Washington sales, without any deduction for any costs or expenses, even if those costs or expenses are incurred outside the State. In this respect, it is exactly like the Washington retail sales tax.

For purposes of the business and occupation tax as applied to contractors, the "sale" consists, in effect, of the sale of entire structure that the contractor is building. Under that tax, the actual construction of the structure is statutorily considered to constitute the sale itself. (Wash. Rev. Code § § 82.04.050 (J.S. A-116) and .060.)[3] And accordingly, the measure of the tax is the entire amount

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[2]For some contracts, CBI acted as a "prime" contractor, thus coming within the retailing category, and for others it acted as a "sub" to the "prime," thus coming within the wholesaling category. Which category is applicable in any particular case makes no difference whatsoever either analytically or practically.

[3]In its question presented, CBI erroneously assumes, and would have this Court assume, that "* * * all selling activity * * * occur[s] in other states * * *" This overlooks the fact that the most important and critical element of selling activity, i.e., the actual construction of the structure, takes place in Washington.

received by the contractor for the building and sale of the containment vessel, oil storage tank, or other type of structure.[4]

C. CBI's Principal Claim

CBI's principal claim is that the measure of the tax is too broad, and that the Commerce Clause requires an apportionment of the tax base which would convert Washington's gross receipts tax into a type of value-added tax. That is, only the 30 to 40% of the gross receipts attributable to value added in Washington may be included in the tax base. The rest, being attributable to value added outside Washington, must be excluded.

This claim, however, is made only with respect to 16 of CBI's 149 contracts for Washington jobs during the audit period. For the remaining 133, CBI concedes that 100% of the gross receipts may be included in the tax base. What distinguishes these 16 from the rest is that the rest were negotiated through the use of CBI's in-state offices and personnel, while the 16 were negotiated and entered into outside the State, without, it is contended, any participation by in-state offices or personnel. Stip. Par. 6, J.S. A-136, 137.

II

ARGUMENT

The Case Presents No Substantial Question and the Decision Below Is Clearly Correct.

A. CBI's Principal Claim Presents No Substantial Federal Question That Remains Unresolved By This Court's Decisions.

1. *General Motors and Standard Pressed Steel are Dispositive.*

CBI's claim that Washington's retailing and wholesaling business and occupation tax is not fairly

[4]For business and occupation tax purposes, the distinction between federal and non-federal contractors which was the subject of this Court's decision in *Washington v. United States*, ___ U.S. ___ (1983) does not exist. They are treated identically.

apportioned is directly contrary to two prior decisions of this Court involving the precise taxes at issue here.

Under *General Motors Corp. v. Washington*, 377 U.S. 436 (1964) and *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975), Washington's business and occupation tax may be measured by the total gross proceeds from interstate sales to Washington customers, so long as the in-state activities performed by the taxpayer's personnel "* * * were substantial 'with relation to the establishment and maintenance of sales, upon which the tax was measured.' " *Standard Pressed Steel*, 419 U.S. at 563, quoting from *General Motors*, 377 U.S. at 447.

In both *General Motors* and *Standard Pressed Steel*, items sold to the Washington customers were precisely the items which were manufactured outside the State and shipped from there, without alteration, to those Washington customers. In *General Motors*, they were entire automobiles; in *Standard Pressed Steel*, they were fasteners for making airplanes. In both, the in-state services consisted solely of sales or engineering services which, although certainly necessary to maintain the taxpayer's Washington market, did not in any way produce or alter the items being sold.

CBI apparently recognizes the applicability of *General Motors* and *Standard Pressed Steel* to 133 of its Washington contracts, though not to the remaining 16. Stip. Par. 6, J.S. A-136, 137. But these two decisions are dispositive of the 16 as well.

This is because of a simple but critical point, which CBI completely overlooks. CBI's in-state construction activities, in and of themselves, are certainly even more "substantial 'with relation to the establishment and maintenance of sales' " than were the in-state activities in *General Motors* and *Standard Pressed Steel*. After all, CBI's customers wanted, contracted for, and received completed structures, not just components. And it is CBI's in-state activities which produced those completed structures under all of the contracts, including the 16 in dispute here.

For this reason, the issue presented in this case is actually much easier than that presented in *General Motors* or *Standard Pressed Steel*.[5]

CBI could well rely on *General Motors* and *Standard Pressed Steel* if it entirely built its nuclear containment vessels or oil storage tanks outside the State, put them on a barge or railroad car, and then somehow dropped them into place for its customers. However, the structures CBI builds are simply too large for that. They can only be built in-state, on the site where their Washington customers want them permanently affixed. And this in-state building activity is the *sine qua-non* for making any sales at all to CBI's Washington customers.

In summary, in order for a state to include within the base or measure of a gross receipts tax the receipts from a sale of property, there must be more than just delivery to an in-state customer. There must be the additional element of nexus. That "nexus" may be the type of in-state selling and service activities involved in *General Motors* and the consulting and troubleshooting involved in *Standard Pressed Steel*. But in lieu of those activities, the nexus may be the actual in-state building, construction, or manufacture of the property which is sold. And that is what is involved here.

The curious nature of CBI's claim should now be apparent, especially in light of its position on the remainder of its Washington business. CBI paid without

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[5]If General Motors received orders for automobiles from Washington dealers and then assembled those automobiles in Washington, adding through this assembly process some 30 to 40 percent of the total value of the automobiles, and then delivered them to Washington dealers, surely Washington's business and occupation tax could be applied to those sales, and be measured by the total amount of those sales. This would be so even if General Motors did absolutely nothing else in the State with respect to these sales; *i.e.*, if all the contracts were executed outside the State and if all contacts involving these sales between General Motors personnel and the Washington dealers took place there as well.

If General Motors, under the circumstances given in this example, claimed that Washington could include only 30 to 40 percent of the gross proceeds from the sales of these automobiles in its tax base, such a claim would be rejected as frivolous. But that is, in essence, CBI's claim here.

protest retailing and wholesaling business and occupation tax, measured by the entire gross proceeds of the sale, on 133 contracts in Washington. As to these, CBI makes no claim that there should be further apportionment.

Nor does CBI dispute that for 13 of 16 contracts here involved,[6] the constitutionally required nexus exists, by reason of the in-state building or construction of the property being sold. J.S. 35. CBI's contention, rather is that the amount of the nexus provided by this in-state building activities must somehow be quantified, and must then be used to determine the portion of the gross receipts that may be utilized in the tax base. But when in-state sales or service activities of the sort involved in *General Motors* and *Standard Pressed Steel* provide the nexus, then this quantitative relationship between nexus and the tax base is no longer constitutionally required.

We fail to see any rationale at all for this proposed distinction. And CBI provides none.

2. *Exxon and Mobil In No Way Undercut The Applicability of General Motors and Standard Pressed Steel.*

CBI relies heavily upon *Exxon Corp. v. Department of Revenue*, 447 U.S. 207 (1980) and *Mobil Oil Corp. v. Commissioner*, 445 U.S. 425 (1980). These were net income tax cases, involving two related issues. In *Mobil*, the issue was whether dividends received by a parent from subsidiaries which, with the parent, constituted a unitary business, could be included in apportionable tax base of the parent. The Court held the dividends could be so included. In *Exxon*, the issue was whether a state could include in the apportionable tax base the total net income of a unitary business, including net income derived from out-of-state production when the state of production itself imposed a severance tax on that production. Again, the Court held that the total income could be included in the apportionable tax base.

Neither case even remotely suggests that the holding and rationale of *General Motors* and *Standard Pressed*

[6]The existence of nexus for the three so-called Kamyr contracts is in dispute. See p. 12, infra.

Steel are to be overturned, or that Washington business and occupation tax must be turned into a value-added tax.

Mobil and *Exxon* are inapposite for an even more fundamental reason. Gross receipts taxes, such as the tax involved here, are more akin to a general retail sales tax than a net income tax. Indeed, the general retail sales tax is a species of a gross receipts tax. Quite logically, then, the criteria applied by this Court in such gross receipts tax cases as *International Harvester v. Indiana Department of Treasury*, 322 U.S. 340 (1944), *General Motors*, and *Standard Pressed Steel* have paralleled the criteria applied in sales tax cases. Indeed, in the first of these cases, *International Harvester*, Justice Douglas, speaking for the majority, explicitly stated that the criteria should be identical. See 322 U.S. at 348, 349.[7] That approach has been followed ever since.

CBI is here asking for a complete shift away from this approach, which has been utilized by this Court for at least 39 years. Certainly *Mobil* and *Exxon* provide no basis for making such a shift. And if it is to be made at this late date, we would suggest that the Congress, rather than this Court, is now the appropriate body to make it.

B. CBI's Claim of Multiple Taxation also Presents no Substantial Federal Question that Remains Unresolved by this Court's Decisions.

CBI claims that Washington's tax subjects it to the risk of multiple taxation. J.S. 20-26. No claim is made, however, that CBI is subject to any *actual* multiple taxation. Indeed, there is nothing in the record to support

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[7]As there stated:

"We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' (McGoldrick v. Berwind White Coal Min. Co., supra) are as adequate to support this tax as they would be to support a sales tax." 322 U.S. at 349. That should be the holding here as well.

such a claim, even if it were made.[8] Thus, CBI is in precisely the same position as were the taxpayers in *General Motors* and *Standard Pressed Steel.* And just as in those cases, the absence of any existing duplicative or multiple taxation not only alters the nature of CBI's claim, but is fully dispositive of that claim.

As this Court stated in General Motors:

> "A more difficult question might arise from appellant's claim of multiple taxation. Gwin, White & Prince, Inc. v Henneford, 305 US 434, 440 (1939). General Motors claims that some of its products taxed by Washington are manufactured in St. Louis where a license tax, measured by sales before shipment, is levied. See American Mfg. Co. v St. Louis, 250 US 459 (1919). It is also urged that General Motors' Oregon-based activity which concerns Washington sales might afford sufficient incidents for a similar tax by Oregon. The Court touched upon the problem of multiple taxation in Northwest Airlines v Minnesota, supra, 322 US at 295, but laid it to one side as 'not now before us.' Thereafter, in Northwestern States Portland Cement Co. v Minnesota, supra, 358 US at 463, we held that '[i]n this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. cf. International Harvester Co. v

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[8]CBI paid income tax in other states and CBI attempted to calculate, through separate accounting, how much income tax was attributable to each contract. Stip. Par. 162-168. The payment of income tax does not constitute a multiple burden when compared with a severance tax on the value or quantity of minerals produced (See *Exxon,* 477 U.S. at 229 f.n. 12) or a gross receipts tax on the activity of making retail or wholesale sales. Even if this were a multiple tax situation it is de minimis. Washington's tax on the contracts at issue was $102,936.85. Stip. Attachment B. CBI calculates that it paid $12,025.26 in income tax to other states on these contracts. Stip. Par. 168. This is an alleged tax overlap of only 11.68%. This is much smaller than the 34.38 to 37.01% overlap alleged in *Moorman Manufacturing Co. v. Blair,* 437 U.S. 267 at 276 (1978), f.n. 10. The Court has consistently refused to read into the Constitution a requirement for mathematical precision in apportionment. 437 U.S. at 278, 279.

> Evatt, 329 US 416, 421-424, (1947). And further, is has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of 'multiple taxation,' e.g., Northwestern States Portland Cement Co. v Minnesota, supra, and we adhere to that position." 377 U.S. 448, 449.

Similarly, in *Standard Pressed Steel* the Court relied upon this language in *General Motors*, in disposing of the same claim of multiple taxation:

> "We noted in General Motors that a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it. Id., at 449. The corporation made no such showing there. Nor is any effect made to establish it here." 419 U.S. at 593.

CBI is reduced to making the same theoretical argument as was made in *General Motors* and *Standard Pressed Steel*, i.e., that if other states had Washington's tax system, CBI would be subject to a multiple burden. Even this argument, however, is incorrect. Washington's business and occupation tax, as applied to retailing and wholesaling activities, is imposed only with respect to sales consummated by delivered in Washington. As the state of delivery, Washington is the only state which can impose a gross receipts tax on the business of making those sales. See *Evco v. Jones*, 409 U.S. 91 (1972), striking down a gross receipts tax imposed by the state of origin with respect to interstate sales.

The point made by this Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) regarding Montana's severance tax on coal is applicable here as well.

> "Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, 'the severance tax can occur in no other state' and 'no other state can tax the severance.'" 453 U.S. at 617.

So too here, no other state can tax what Washington is taxing. See also *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 at 260 (1938).

C. CBI's Claim of Discriminatory Taxation Presents no Substantial Federal Question That Remains Unresolved by this Court's Decisions.

CBI makes a secondary claim that Washington's tax discriminates against interstate commerce. J.S. 27, 28. In addition to the business and occupation tax on retailing and wholesaling activities (Wash. Rev. Code §§ 82.04.250, .270), a tax is also imposed on manufacturing activities. (Wash. Rev. Code § 82.04.240) If a taxpayer manufactures in Washington and subsequently sells the product so manufactured in this State, only the wholesaling or retailing tax is applicable, not the manufacturing tax. (Wash. Rev. Code § 82.04.440, J.S. A-124) CBI claims that this exemption from the manufacturing tax discriminates against interstate commerce.

This precise claim was raised by the taxpayer in *General Motors*. See 377 U.S. at 459, 460 (Goldberg, J., dissenting). The majority in *General Motors* was not sufficiently troubled by the question to even discuss it.

This was for good reason, as the Court's subsequent decisions show. A tax discriminates when it provides, in the form of a lower tax bill, a direct advantage to a local business not enjoyed by an interstate business. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) and *Maryland v. Louisiana*, 451 U.S. 725 (1981). Washington's tax provides no such advantage to the local business, and is completely neutral as between interstate and intrastate commerce.[9]

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[9]The vice of the tax systems invalidated in *Maryland v. Louisiana* and *Boston Stock Exchange* is succinctly described in a provision of HR 6402, 97th Cong., 2d Sess. (1982), *i.e.*, § 622, entitled "Prohibition Against Geographical Discrimination:"

> "No provision of State law shall make any person liable for a greater amount of sales or use tax with respect to tangible personal property, or gross receipts tax with respect to tangible personal property, *by virtue of the location of any occurrence in a State outside the taxing State, than the amount of tax for which such person would otherwise be liable if such occurrence were within the State* * * *"(Emphasis supplied)

Washington's tax, of course, would not in any way violate such a provision.

To be more specific, precisely the same tax, in precisely the same amount, is imposed upon contractors such as CBI, regardless of whether the components or materials they use in their construction projects come from within the state or outside the state. Thus, the Washington tax is indistinguishable in this respect from that upheld in *Montana*, which the Court described as follows:[10]

> "But the Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this evenhanded formula. We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases. See, e.g., Maryland v Louisiana, 451 US 725, (1981); Boston Stock Exchange v State Tax Comm'n, 429 US 318 (1977); * * *" 453 U.S. at 618.

D. The Three Kamyr Contracts Present No Substantial Federal Question.

CBI raises one additional issue with regard to three of its contracts. J.S. 36-39. The issue presented by the so-called Kamyr contracts is narrow, and involves only a

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[10]Washington tax in this respect is also similar to the tax in *Boston Stock Exchange v. State Tax Commission*, as it existed *prior* to the 1968 amendment which this Court ruled unconstitutional. The original tax was imposed on sales, agreements to sell, memorandum of sales, delivery of stock and transfer of stock. The tax applied if any of these five events took place in New York. However, if more than one event took place, only one tax was paid on the entire transaction. 429 U.S. at 321, 322. This is similar to Washington manufacturing and retailing taxes. If both activities occur in Washington only one tax is paid. The Court indicated in *Boston Stock Exchange* that such a system did not discriminate against interstate commerce. In the words of the Court:

> "Prior to the 1968 amendment, the New York transfer tax was neutral as to in-state and out-of-state sales. An in-state transfer or delivery of securities triggered the tax and the burden fell equally on all transactions regardless of the situs of sale. Thus, the choice of an exchange for the sale of securities in New York was not influenced by the transfer tax; wherever the sale was made, tax liability would arise. The flow of interstate commerce in securities was channeled neither into nor out of New York by the state tax." 429 U.S. at 330.

question of nexus, not apportionment or multiple taxation. The nexus issue arises from the fact that the three Kamyr transactions differ from the others in one respect. Though each was the product of a single negotiation, which resulted in a single price for each total job, each transaction was bifurcated into two separate contracts, one covering design, fabrication, and sale of the components ("component contract"), the other covering the erection or construction ("erection contract") Stip. Par. 170.

CBI concedes the existence of nexus for the erection contracts, which accounted for at least 40 percent of the total price negotiated for the total job, and concedes that this portion of the total price is properly includable in the tax base. It contests, however, inclusion of any of the remainder, which is accounted for by the component contracts.[11]

This contention is without merit. The question is not whether nexus exists to tax CBI, but whether the Kamyr contracts may be disassociated from CBI's local business. The Court's decision in *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951) is controlling. There the taxpayer made a similar claim with respect to certain of its sales into Illinois. The Court stated:

> "But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only showing that particular transactions are dissociated from the local business and interstate in nature." 340 U.S. at 537.

CBI has clearly submitted itself to Washington's taxing jurisdiction. Thus, the only issue is whether CBI has sustained its burden of disassociating the Kamyr contracts from its Washington business. Perhaps CBI could meet this burden if it simply delivered a completed

[11]The Kamyr contracts were bifurcated at the request of CBI's customer, which was itself bifurcated into Kamyr, Inc., the other party to the components contracts, and its sister corporation, Kamyr Installations, Inc., the other party to the erection contracts. These two corporations were contractors with a single customer, Weyerhaeuser Co., and CBI acted as a subcontractor. J.S. A-86, 87.

product to its customer in Washington, off of a railroad car or barge. This, however, is not what CBI did or what its contracts required it to do.

The record makes it clear that without the erection contracts and the in-state activity of CBI which took place thereunder, the sales of the components would never have taken place at all. From beginning to end, the sale of the components and the erection activities were part of a single, integrated transaction for which a single, lump sum price was negotiated, just as in the case of all the other contracts.[12]

Thus, the local construction or erection activity was absolutely essential to CBI's sales under the Kamyr contracts. Since these sales cannot be disassociated from CBI's local business activity, they are properly subject to Washington's tax.

E. There is No Confusion Among the States Regarding the Issues Involved Here; and Congressional Inaction Shows That the Questions Raised by CBI Are Not Substantial.

CBI urges the Court accept jurisdiction because there is some confusion among the states on the question of the constitutional necessity of apportionment of gross receipt taxes. J.S. 28-32. In fact, no such confusion exists. Indeed, especially after *General Motors* and *Standard Pressed Steel*, the applicable principles are quite clear. Simply stated, the destination state may apply a gross receipts tax, measured by the total proceeds of sales within its borders, if there is the constitutionally required nexus. Conversely, without that nexus, none of those proceeds

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[12]As stated in paragraph 47 of the Stipulation:

"* * * CBI had the policy of negotiating all jobs in terms of a lump-sum price for all aspects of the work. Normally, CBI did not contract for any single aspect (that is, design, engineering, procurement of materials, manufacturing, installation or delivery) without contracting for all aspects of a job."

The three Kamyr transactions were not exceptions to this policy.

may be utilized in the tax base.[13] Here, of course, the existence of the constitutionally required nexus is simply not an issue—with the exception of the three Kamyr contracts.

Nor has the Congress seen fit to reverse or modify these principles. Indeed, it has seldom even contemplated such action. As the Court has observed in another context: "Non-action by Congress is not often a useful guide, but the non-action here is significant." *Bob Jones University v. United States*, ___ U.S. ___ (1983) (Slip. Op. 25). Since the issuance of what is commonly called the Willis Report, (Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong., 2d Sess. (1964)), numerous bills have been introduced to regulate state taxation of interstate businesses. See, e.g., H.R. 11798, 89th Cong., 1st Sess. (1965); H.R. 16491, 89th Cong., 2d Sess. (1966); S. 317, 92d Cong., 1st Sess. (1971); S. 1245, 93d Cong., 1st Sess. (1973); S. 2080, 94th Cong., 1st Sess. (1975); H.R. 9, 94th Cong., 1st Sess. (1975); S. 983, 96th Cong., 1st Sess. (1979); H.R. 6402, 97th Cong., 2d Sess. (1982). With the exception of the first, which would have allowed only the origin state to impose a gross receipts tax on sales of property, every one of these bills, if enacted, would have allowed Washington's business and occupation tax to be applied in the manner which we here urge and which the courts below upheld, and would continue the pattern, established by this Court, of treating gross receipts taxes in a manner similar to that utilized for

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[13] As this Court recognized in *Standard Pressed Steel*, the application of these principles results in a type of apportionment.

> "In the instant case, as in *Ficklen v. Shelby County Taxing District*, 145 U.S. 1 (1892), the tax is on the gross receipts from sales made to a local consumer, which may have some impact on commerce. Yet as we said in *Gwin, White & Prince*, supra, at 440, in describing the tax in *Ficklen*, it is 'apportioned exactly to the activities taxed,' all of which are intrastate." 419 U.S. at 564.

"Allocated" might be, we would agree, a better descriptive term than "apportioned". But whatever term one uses, no additional apportionment of the sort proposed by CBI has ever been required by this Court. Nor, as we shall see, has Congress ever contemplated such an additional apportionment.

retail sales taxes. This shows that the issues raised by CBI are of little national importance, and can hardly be considered as substantial.[14]

CONCLUSION

For the reasons given above, this appeal should be dismissed or, in the alternative, the judgment should be affirmed.

Respectfully submitted,

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[14]The last of the series, H.R. 6402, is typical. Although it distinguishes between sales taxes and gross receipts taxes in terms of whether the tax is separately stated from the sales price or not (§§ 603, 605), it establishes a uniform jurisdictional standard applicable to both. (§101) Moreover, under this standard, which is cast in terms of a business location (cf. §611), if the standard is met by the taxpayer, *all* of that taxpayer's sales apparently go into the sales or gross receipts tax base, even though the business location may have had nothing to do with those sales. (See §101 last sentence; but cf. §623(3)). In this manner, H.R. 6402 may actually expand taxing jurisdiction.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

CHICAGO BRIDGE & IRON COMPANY,
Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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I

ABSENCE OF SELLING ACTIVITY IN STATE RENDERS GENERAL MOTORS AND STANDARD PRESSED STEEL INAPPLICABLE

The State presents differing arguments as to why it believes this case is controlled by the holdings in General Motors v. Washington, 377 U.S. 436 (1964), and Standard Pressed Steel Co. v. Washington Dept. of Revenue, 419 U.S. 560 (1975).

At one point the State concedes that, here, there are not the type of in-state sales activities involved in those cases, and at another point it states that installation constitutes a selling activity.

The State argues that nexus may be the type of in-state activities involved in General Motors and in Standard Pressed Steel, but "in lieu of those activities, the nexus may be the actual in-state building, construction or manufacture of the property which is sold. And that is what is involved here". Motion to Dismiss or Affirm, p.6. The State then proceeds to argue that, so long as General Motors and Standard Pressed Steel do not require apportionment where there are in-state sales activities of the sort there involved, then there is no rationale for requiring apportionment where there are no such in-state sales activities.

no such in-state sales activities.

The State is correct that Appellant has chosen not to contest the State's imposition of its business and occupation tax (hereinafter "B&O tax") on the proceeds from those contracts in which its Washington sales office (located in Seattle) was involved in sales activities. To do so would have required a direct challenge to this Court's decisions in General Motors, supra, and Standard Pressed Steel, supra. While in light of Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980), and Complete Auto Transit v. Brady, 430 U.S. 274 (1977), Appellant believes that eventually this Court should re-examine those earlier decisions' acceptance of gross receipts taxation without apportionment where the contract proceeds resulted from in-state sales

activities,[1/] here Appellant chose to focus the Court's attention on the taxation of those 16 disassociated contracts in which the parties stipulated that there was no in-state sales procurement activity.

Despite its above-quoted concession that the nexus supplied by in-state installation activity is distinguishable from the selling activities which related to, preceded, and in practical effect resulted in the sales taxed in General Motors and Standard Pressed Steel, in

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1/ "If as Complete Auto suggests, the distinction between local and interstate activities no longer has a crucial role in commerce clause analysis, General Motors and Standard Pressed Steel have lost vitality. Taxes measured by gross receipts from interstate commerce should be recognized as taxes on or affecting interstate commerce and subject to the apportionment requirement as are other taxes affecting interstate commerce. There is no principled basis for treating them differently." Shores, "State Taxation of Interstate Commerce--Quiet Revolution or Much Ado About Nothing?" 38 Tax L.Rev. 127, 149-50 (1982). [Footnote Omitted.]

footnote 3 of its Motion to Dismiss or Affirm the State argues that installation of the structures in Washington constitutes "selling activity." In doing so, the State ignores the stipulated fact that Appellant's Seattle sales office "was not involved in any aspect of any of" the 16 contracts here involved (Stip. ¶ 18; emphasis supplied) and that the 16 contracts were in every case negotiated, procured and finalized between Chicago Bridge & Iron Company's (hereinafter "CBI") sales offices outside of the State of Washington and the customers' purchasing offices outside the State of Washington. Stip. ¶¶ 13, 14, 15, 17, 50; Stip. Attachments 1-16, item 7.

Although this installation activity has been defined by the Washington State Legislature as either a wholesale or retail sale (see RCW 82.04.040, RCW 82.04.050 and RCW 82.04.060), this formal

characterization does not transform installation activity into something other than what it is. See Wisconsin v. J. C. Penney, 311 U.S. 435, 443-44 (1940). The State's attempt to create constitutional significance by labeling the local taxable incident of installation as "making sales" is a mechanical approach involving definition and formalism, rather than substance, and has been rejected by this Court. See Complete Auto Transit, Inc. v. Brady, supra; Commonwealth Edison Co. v. Montana, 453 U.S. 609, 614-17 (1981); Mobil Oil Corp. v. Commissioner of Taxes, supra.

II

WASHINGTON, AS THE STATE OF DELIVERY, IS DISCRIMINATING AGAINST INTERSTATE COMMERCE AND SUBJECTING CBI TO THE RISK OF MULTIPLE TAXATION

Contrary to the State's claim, existing law does not support the State's assertion that as the state of delivery,

Washington is the only state which can impose a gross receipts tax based on the sales price of the products here involved.

This argument of the State, and the corresponding discussion in the opinion below, is based upon an attempt to bifurcate Washington's gross receipts tax into two separate taxes, that is, one on selling and one on manufacturing. There would be more substance to this argument if there were, in fact, two separate taxes so that a Washington manufacturer selling in Washington paid two taxes. In that case the Washington manufacturer would be on a par with its out-of-state competitor. But this is not the case.

The tax system of Washington itself negates this argument by integrating the gross receipts tax on both sales and manufacturing activities so that no tax is imposed on manufacturing in Washington if a tax is imposed on selling. What

renders the Washington tax discriminatory is that, in substance, one who is subject to the retail or wholesale B&O tax being imposed here is being given an exemption by RCW 82.04.440 from B&O manufacturing taxes otherwise due on the taxpayer's State of Washington manufacturing of the products sold, but is given no exemption from taxes which may be imposed under an identical law on this manufacturing if the taxpayer manufactures out-of-state and then ships the goods into Washington in interstate commerce. See, Maryland v. Louisiana, 451 U.S. 725 (1981).

The foregoing is true whether Appellant's in-state activities are referred to as "installation," as used in the Stipulation, or as "construction," as used in the State's motion here. What is involved is the putting together in Washington of subassemblies, sold and

manufactured outside Washington as a completed tank and shipped broken down. Apparently the State seeks to compare this situation with the building of a structure in Washington where some materials were purchased out of state. However, in that case, whether the materials came from within or without Washington, only Washington could tax the final sales price. If the materials came from out of state, then the state supplying the materials could tax only the value of the materials. Where, as here, the entire product is manufactured in one state, even though assembled or installed in another state, the state of manufacture can tax the entire final sales price under the tax system of Washington and other gross receipts states, with some states like Washington allowing deduction of the cost of installation and other states like West Virginia allowing deduction of

transportation costs.[2/] See Wash. Admin. Code 458-20-137; Wash. Excise Tax Bulletin No. 399.04.137, dated July 3, 1970; Ch. 11, Art. 13, Code of W.Va.; W.Va. Reg. BOT § 1.2.A.1.b.

The final sales price of a completed product, such as a tank, far exceeds the cost of the materials included therein since the final price must reimburse the

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[2/] West Virginia's statutes and regulations are similar to those of Washington. See Ch. 11, Art. 13, Code of W.Va.; W.Va. Reg. BOT § 1.2.A.1.b (which states that where the manufacturing occurs in West Virginia and the product is sold and shipped to another state, "the full amount received from such sale shall be reported under the manufacturing classification of the business and occupation tax return." If a constitutional distinction is to be made based on whether actual discriminatory gross receipts taxation has occurred, then Washington tax as here applied would be unconstitutional as to products manufactured in West Virginia and other gross receipts states and installed in Washington, but constitutional as to products manufactured in other states. This, we submit, would be an administrative nightmare when applied to the myriad of interstate transactions.

seller for all his sales, design, engineering, manufacturing, installation, and overhead costs. Thus, to have two states each tax a transaction based on the final sales price is to permit multiple taxation that differs from taxation by one state of the final sales price and by another of the price of some materials.

It is true that in Evco v. Jones, 409 U.S. 91 (1972), cited by the State, a gross receipts tax imposed by the state of origin with respect to interstate sales was struck down, citing with approval J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1937). At the time of those opinions this Court had held that a state tax would be unconstitutional if imposed directly on the "privilege" of engaging in interstate commerce, but could be valid if imposed on a "local incident" rather than directly on interstate commerce. See Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602

(1951). In 1977, this Court in Complete Auto Transit, supra, overruled the rule of Spector and cases incorporating such rule, and held that, in certain circumstances, a fairly apportioned state tax may be imposed directly on interstate commerce without regard to a formalistic label.

In both Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980), and Mobil Oil Corp. v. Commissioner of Taxes, supra, this Court rejected the attempt to establish an express constitutional preference for "taxation by allocation" (such as that imposed here by the State of Washington) over "taxation by apportionment" when interstate commerce is involved.[3/]

[3/] Similarly, by not enacting the legislation referred to on page 15 of the State's Motion to Dismiss or Affirm, Congress has rejected attempts to subject the unapportioned proceeds of a contract to gross receipts taxation by the destination state.

In both the Exxon and Mobil cases, the tax before this Court was already an apportioned tax. In each the taxpayer was arguing that the income in question should be allocated entirely to another state. If the law of the taxing state then before this Court were adopted by the state to which the taxpayer sought to have it allocated, there still would not have been even the risk of multiple taxation since the law of the state then before this Court would have required apportionment. See Mobil Oil Corp. v. Commissioner of Taxes, supra, 445 U.S. at 444. This is unlike the Washington B&O tax which allocates to itself 100% of CBI's gross receipts from these contracts, thereby subjecting CBI to the risk of discriminatory multiple taxation if the states of manufacture were to adopt the laws of the State of Washington.

The State's suggestion that, like the

pre-1968 New York transfer tax referred to in dicta in Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977), the Washington B&O tax is completely neutral as between interstate and intrastate commerce, ignores economic reality. Apparently the State's position is that its gross receipts tax is a single factor tax like a sales tax or like the tax involved in Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), reh'g denied, 439 U.S. 885 (1978) and thus applies equally to in-state and out-of-state competitors. However, in Moorman, if the states of manufacturing and destination had had the same tax system as was there involved, there would have been only one tax on the interstate manufacturer/seller, just as there would have been on the in-state competitor.

Dismissal of this appeal would leave standing the opinion below holding that the risk of multiple taxation is not a

sufficient ground for declaring a tax unconstitutional, actual multiple taxation being required. This could result in the constitutionality varying according to the vagaries of the tax laws of each of the other states, a result contrary to the statements of this Court. Mobil Oil Corp. v. Commissioner of Taxes, supra, 445 U.S. at 444; Austin v. New Hampshire, 420 U.S. 656, 668 (1975). While this Court indicated that "these are the circumstances in which apportionment is ordinarily the accepted method" [Mobil, supra, 445 U.S. at 446, Exxon, supra, 447 U.S. at 229], here the State asserts that such apportionment has never been "required" by this Court. (Motion to Dismiss or Affirm, p.15 n.13.) The instant case affords this Court the opportunity to clearly establish a constitutional preference for "taxation by apportionment" since here, unlike the situation in Mobil and Exxon, the tax laws

before the Court fail to apportion.

If, as the State suggests, only the destination state may impose a gross receipts tax, then this Court should accept jurisdiction and so clarify the law. If, as Appellant suggests, there is no such preference for taxation by allocation then we request that the Court accept jurisdiction and rule for Appellant in this case.

III

A "VALUE-ADDED" CONCEPT IS CONSISTENT WITH APPORTIONED GROSS RECEIPTS TAXATION

The State argues that requiring reapportionment here would convert Washington gross receipts tax into a type of value-added tax. This argument incorrectly implies that the concepts are incompatible.

Just as taxpayers utilizing apportionment formulas in net income tax states apply the appropriate apportionment factor against an apportionable tax base, which includes income earned from

within and without the taxing state, so here CBI proposes that the ratio of in-state costs to total costs is an appropriate apportionment factor to apply against the undiminished apportionable tax base of receipts earned from activities within and without the State.

The State has never offered any rationale as to why this apportionment factor, which is required by RCW 82.04.460(1) for the gross receipts tax on services, should not be required for installation services in connection with sales procured and manufactured outside Washington State, other than to note the previously mentioned fact that Washington statutory law defines this installation service as a sale.

This Court has indicated that both "nexus" and "apportionment" are necessary for imposition of a state tax to be valid. Complete Auto Transit v. Brady, supra. An

apportionment that approaches a concept of taxing the relative "value added" to the product by the respective states involved is in accordance with this Court's preference for "apportionment," rather than "allocation," as discussed above.

IV

THE THREE KAMYR MANUFACTURING CONTRACTS HAVE BEEN DISASSOCIATED FROM APPELLANT'S IN-STATE ACTIVITIES

Appellant has shown that the three Kamyr manufacturing contracts are disassociated from Appellant's local business activities. Stip.¶ 17, 18, 50, 170, item 7 of Stip. Attachments 1, 2 and 3. Notwithstanding the fact that all activities under these contracts were stipulated to have taken place outside the State of Washington, other than delivery, the State argues that without the installation of the products by Appellant within the State of Washington, even though by separate contracts with a separate party,

the out-of-state sales of the components would never have taken place.[4/] There is no factual support for such allegation.

While as stated in paragraph 47 of the Stipulation, CBI did not "normally" contract for any single aspect (that is, design, engineering, procurement of materials, manufacturing, installation or delivery) without contracting for all aspects of a job, here CBI did enter into separate manufacturing contracts which did not provide for in-state installation. This does not mean that the purchaser would not have purchased the manufactured goods if its sister corporation had to

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[4/] The State makes a "but for" argument by which any state can impose an unapportioned gross receipts tax on any transaction in interstate commerce where some necessary post-sales event takes place in the state. This Court has previously rejected this type of argument where the event is post-sales. See Norton Co. v. Illinois Department of Revenue, 340 U.S. 534 (1951) (delivery); American Oil Company v. Neill, 380 U.S. 451, 457-459 (1965) (destination).

have a third party perform the installation activities. Appellant has paid and does not contest the B&O taxes with respect to the in-state installation contracts. It has, we submit, disassociated the separate manufacturing contracts, the entire performance of which occurred outside the State of Washington.

CONCLUSION

For all the reasons stated herein and in the Jurisdictional Statement, we respectfully submit the questions here presented are so substantial as to require plenary consideration, with briefs on the merit and oral argument, and request that the Court accept jurisdiction and ultimately rule for Appellant in this case.

DATED: August 30, 1983.

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